RECEIVED
SEP 12 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. _____

78-5384

DAVID SANDSTROM, Petitioner

-v-

STATE OF MONTANA, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF MONTANA

BYRON W. BOGGS
ATTORNEY FOR PETITIONER
212 East Park Avenue
Anaconda, Montana 59711

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	2
Statement of Case	2
Reasons for Granting Writ	5
I. THE JURY INSTRUCTION, "THE LAW PRESUMES THAT A PERSON INTENDS THE ORDINARY CONSEQUENCES OF HIS VOLUNTARY ACTS," DEPRIVED THE PETITIONER OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF THE LAW.	5
II. THE MONTANA SUPREME COURT DECISION, IN PETITIONER'S APPEAL, IS NOT IN ACCORD WITH WINSHIP, MULLANEY, OR PATTERSON.	5
III. JURY INSTRUCTIONS, OF THE TYPE THE PETITIONER HEREIN COMPLAINS, HAVE BEEN HELD BY A NUMBER OF FEDERAL CIRCUIT COURTS OF APPEAL TO BE VIOLATIVE OF DUE PROCESS OF LAW.	8
IV. PRESUMPTIONS IN MONTANA HAVE THE WEIGHT AND EFFECT OF EVIDENCE AND SHIFT THE BURDEN OF PROOF TO THE DEFENDANT.	9
V. THE ISSUE OF PETITIONER'S INTENT WAS PROPERLY RAISED BY THE TRIAL EVIDENCE AND SHOULD HAVE BEEN SUBMITTED TO THE JURY FOR A DETERMINATION OF INNOCENCE, OR GUILT BEYOND A REASONABLE DOUBT WITHOUT THE STATE HAVING BENEFIT OF A PRESUMPTION.	11
Conclusion	13
Appendix A: Opinions Below	
Opinion of the Supreme Court of Montana of June 8, 1978	14
Rehearing Order of June 28, 1978	21
Judgment of June 29, 1978	22
Journal Entry of Judgment of Judgment of July 25, 1977, of the District Court of the Third Judicial District of the State of Montana	24
Verdict	26
Appendix B: Miscellaneous	
Information	27

TABLE OF CASES

	Page
Bloch v. United States, 221 F.2d 786 (9th Cir. 1955).	9
Cohen v. United States, 378 F.2d 751 (9th Cir. 1967) cert. denied 389 U.S. 897 ( ).	9
In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	5
Mann v. United States, 319 F.2d 404 (5th Cir. 1963).	8
McKenzie v. Montana, 433 U.S. 905, 53 L.Ed.2d 1089, 97 S.Ct. 2968 (1977)	7
Monaghan v. Standard Motor Co., 96 Mont. 165, 29 P.2d 278 (1934).	10
Morrissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed.288 (1952)	6
Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975).	5
Patterson v. New York, 432 U.S. 197, 53 L.Ed.2d 281, 97 S. Ct. 2319 (1977).	5
State v. Collins, ___Mont.___, ___P.2d___, 35 St. Rptr. 992 (1978).	6
State v. Garney, 122 Mont. 491, 207 P.2d 506 (1949).	10
State v. McKenzie, ___Mont.___, ___P.2d___, 35 St. Rptr. 759 (1978).	7
State v. Sandstrom, ___Mont.___, 580 P.2d 106, 35 St. Rptr. 744 (1978).	1
State v. Schaefer, 35 Mont. 217, 88 P.792 (1907).	10
State v. Sharbono, ___Mont.___, 563 P.2d 61, 34 St. Rptr. 196 (1977).	6
United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975).	8
United States v. Berzinski, 529 F.2d 590 (8th Cir. 1976).	9
United States v. Chiantese, 560 F.2d 1244 (5th Cir. 1977).	8
United States v. Erb, 543 F.2d 438 (2d Cir. 1976) cert. denied 429 U.S. 981 (1976).	9

TABLE OF CASES (continued)

	Page
United States v. Garrett, 574 F.2d 778 (3d Cir. 1978).	8
United States v. Robinson, 545 F.2d 301 (2d Cir. 1976).	9

STATUTES

R.C.M. 1947, §94-5-102.	6
U.S. Const. Amend. XIV, § 1.	1

MISCELLANEOUS

Mont. R. Evid. 301 (1977).	9
Webster's New Collegiate Dictionary 668 (6th ed. 1956).	10

RECEIVED
SEP 12 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-5384

DAVID SANDSTROM, Petitioner,

-v-

STATE OF MONTANA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

David Sandstrom, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Montana entered in the above-entitled case on June 8, 1978.

OPINIONS BELOW

The Supreme Court of Montana has issued an opinion in this case, a copy of which appears in Appendix A to this Petition, at page 14. The opinion is officially reported at 35 St. Rptr. 744, 580 P.2d 106. The judgment of the Supreme Court of Montana is printed in Appendix A hereto, infra, page 22. An order denying rehearing is also included in Appendix A of this petition, at page 21. The Journal Entry of Judgment of the District Court of the Third Judicial District of the State of Montana is printed in Appendix A hereto, infra page 24.

JURISDICTION

The judgment of the Supreme Court of Montana (Appendix A infra, page 22) was entered on June 29, 1978. The timely petition for rehearing was denied on June 28, 1978 (Appendix A, infra, page 21). The jurisdiction of the Supreme Court is invoked pursuant to this Court's ability to review and decide any title, right, privilege or immunity specially set up or claimed under the Constitution of the United States. 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Did the Jury Instruction, "The law presumes that a person intends the ordinary consequences of his voluntary acts," deprive the Petitioner of his Constitutional right to due process of the law?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States, are subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privleges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added

STATEMENT OF THE CASE

On November 1, 1976, Mrs. Annie Jessen, eighty-nine years of age and a life-long resident of Anaconda, Montana, was found dead in her home. She was the victim of an assault involving blows to her head by a shovel and five stab wounds in her back from a kitchen knife. Mrs. Jessen had also been sexually assaulted, apparently after her death.

On or about November 22, 1976, Petitioner, David Sandstrom, eighteen years of age, and also of Anaconda, was arrested with regard to an unrelated burglary. Shortly thereafter, while in custody of the Deer Lodge County Sheriff, Petitioner confessed to the slaying of Mrs. Jessen. This confession was later collaborated by various circumstantial facts; the identification of a pubic hair found on Mrs. Jessen as being probably that of Petitioner's; and by Petitioner leading Deer Lodge County law enforcement officers to Warm Springs Creek in Anaconda where he had thrown the knife.

Based upon the confession and collaborating evidence, Petitioner was charged on December 2, 1976, with Deliberate Homicide in that he, "purposely or knowingly caused the death of Annie Jessen." [Information, Appendix B, infra, page 27].

At his arraignment on this charge, Petitioner entered a plea of not guilty and simultaneously filed a notice of intent to rely on a mental disease or defect excluding responsibility for the alleged crime. Pursuant to such notice, Petitioner was examined by Dr. William Stratford, a psychiatrist practicing in Missoula, Montana, and Dr. Michael Nash, a clinical psychologist practicing in Bozeman, Montana. The reports of both doctors were in agreement as to their evaluation of Petitioner's mental condition at the time of the death of Mrs. Jessen. Both men found that Petitioner did not suffer from a mental disease or defect which, under the Montana Criminal Code, would relieve him of responsibility for his acts. Both men did find, however, that Petitioner, a person of borderline retarded intelligence, suffered from a personality disorder marked by impulsiveness, aggressiveness, and a lack of planning. Additionally, the doctors stated that the characteristics of Petitioner's personality disorder, impulsiveness and aggressiveness, would be aggravated to a serious degree by alcohol consumption. On the night the Petitioner caused the death of Mrs. Jessen, evidence shows that he had consumed between three and four six-packs of beer and some whiskey. The doctors formed the opinion, after considering the combination of Petitioner's personality, the evidence of intoxication, and the circumstances surrounding the fatal acts, that Petitioner did not intend the death of Mrs. Jessen. Based on the expert opinions of Drs. Stratford and Nash, Petitioner's attorney informed the jury in his opening remarks that he no longer intended to rely on a mental disease or defect excluding responsibility, but rather intended to contest the allegation that Petitioner acted knowingly or purposely in taking Mrs. Jessen's life.

Petitioner's trial commenced July 18, 1977. The Prosecution's case consisted of the confession together with collaborating evidence. The defense, comprising the testimony of Drs. Stratford and Nash, took the posture that the Petitioner did not have either "purpose" or "knowledge" in causing Mrs. Jessen's death. Both experts supported Petitioner's contention that he did not deliberately cause the death of Mrs. Jessen and it was their opinion that Petitioner did not form the specific intent required by law as an element of the offense of Deliberate Homicide.

Following presentation of all the evidence, the Court included in its instructions to the jury the instruction that, "The law presumes that a person intends the ordinary consequences of his voluntary acts." [Jury Instruction No. 5]. This instruction requested by the Prosecution, was objected to by Petitioner's attorney as contravening the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States by shifting the burden of proof to the Petitioner on the issue of intent. The trial court, however, overruled the objection.

The jury found the Petitioner guilty of Deliberate Homicide and he was subsequently sentenced to one hundred years confinement in the Montana State Prison. (Appendix A, infra, pp. 24,26). This verdict was timely appealed to the Supreme Court of Montana. A principal question raised in that appeal concerned the Constitutionality of Jury Instruction No. 5. See State v. Sandstrom, 34 St. Rptr. at 746 (Appendix A, infra, page 16). The Supreme Court of Montana, however, affirmed the trial court's verdict in a decision dated June 8, 1978. In that decision, the Court stated that the instruction was not violative of due process standards. State v. Sandstrom, 580 P.2d at 109, 34 St. Rptr. at 748. (Appendix A, infra, page 20).

A timely petition for rehearing, again questioning the constitutionality of Jury Instruction No. 5, was denied June 28, 1978. (Appendix A, infra, page 21).

REASONS FOR GRANTING WRIT

I. THE JURY INSTRUCTION, "THE LAW PRESUMES THAT A PERSON INTENDS THE ORDINARY CONSEQUENCES OF HIS VOLUNTARY ACTS," DEPRIVED THE PETITIONER OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF THE LAW.

The Petitioner was charged with Deliberate Homicide under Section 94-5-102(1)(a) of the Revised Codes of Montana: criminal homicide committed "purposely or knowingly." Jury Instruction No. 5, "The law presumes that a person intends the ordinary consequences of his voluntary acts." in effect, eliminated the element of intent from the jurors' consideration thereby depriving Petitioner of protections afforded under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

Under the Due Process Clause, a criminal charge must be established by proof beyond a reasonable doubt of every element of the offense. In re Winship, 397 U.S. 358, 362, 90 S.Ct. 1068, 1071, 25 L.Ed.2d 368 (1970).

> "Let there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364, 90 S.Ct. at 1073 (emphasis added).

Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975), clarified Winship by declaring that a state could not, by the use of presumptions, shift the burden of proof to the defendant. See also, Patterson v. New York, 432 U.S. 197, 215, 53 L.Ed.2d 281, 295, 97 S.Ct. 2319 (1977). The Court, in Mullaney, rejected the Maine homicide scheme which shifted the burden of proof to the defendant to prove heat of passion on sudden provocation. The Court refused the argument that, oftentimes, the burden upon the prosecution to negate the existence of heat of passion in a homicide offense is too onerous and should properly be placed on the defendant.

> "No doubt this is often a heavy burden for the prosecution to satisfy. The same may be said of the requirement of proof beyond a reasonable

> doubt of many controverted facts in a criminal trial. But this is the traditional burden which our system of criminal justice deems essential." 421 U.S. at 701, 95 S.Ct. at 1891.

Accordingly, Jury Instruction No. 5, which required the jury to presume intent from the "ordinary consequences of his voluntary act," denied Petitioner his right of due process. The giving of this instruction relieved the State of proving all the elements of the Petitioner's alleged crime, specifically that he acted purposely or knowingly, beyond a reasonable doubt. This instruction precluded the issue of specific intent by requiring the jurors to presume such intent from the acts of the Petitioner. "[T]he trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act." Morrissette v. United States, 342 U.S. 246, 274, 72 S.Ct. 240, 255, 96 L.Ed.288 (1952). "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." Id...

In Montana, an element of Deliberate Homicide is that such a homicide be committed "purposely or knowingly," R.C.M. 1947, §94-5-102(1)(a). State v. Collins, ___Mont.___, ___P.2d___, 35 St. Rptr. 993, 999 (1978). The language "purposely or knowingly" embodies the concepts of 'mens rea' and 'criminal intent'. State v. Sharbono, ___Mont.___, 563 P.2d 61, 72-73, 34 St. Rptr., 196, 211 (1977). The jury not only had to find that the Petitioner caused the death of Mrs. Jessen, but also, it had to find beyond a reasonable doubt, in consideration of all the evidence, that he caused her death purposely or knowingly. Jury Instruction No. 5 eliminated the element of specific intent, purpose or knowledge, by requiring the jury to presume such intent from the consequences of Petitioner's act.

II. THE MONTANA SUPREME COURT DECISION, IN PETITIONER'S APPEAL, IS NOT IN ACCORD WITH WINSHIP, MULLANEY, OR PATTERSON.

The opinion in Petitioner's appeal relied heavily upon a case decided concurrently therewith by the Supreme Court of Montana;

State v. McKenzie, ___Mont.___, ___P.2d___, 35 St. Rptr. 759 (1978). McKenzie was decided upon remand from this Court. In remanding, this Court directed the Montana Court to decide an issue on the use of presumptions in light of Patterson v. New York, supra.. McKenzie v. Montana, 433 U.S. 905, 53 L.Ed.2d 1089, 97 S.Ct. 2968 (1977). In State v. McKenzie, the Supreme Court of Montana ruled on the Constitutionality of the use of three jury instructions which inferred or presumed intent in a Deliberate Homicide offense. 35 St. Rptr. at 778. One of the questioned presumption instructions in McKenzie was identical to Jury Instruction No. 5; the jury instruction the Petitioner herein contests. The Supreme Court of Montana decisions in McKenzie and Petitioner's appeal, however, were not decided in accord with Patterson.

Patterson, unlike McKenzie and Petitioner's appeal, concerned affirmative defenses. The State of New York, as required by its murder statute, had to prove beyond a reasonable doubt all the elements of that offense; death, intent to kill, and causation. 432 U.S. at 205, 53 L.Ed.2d at 289. A murder defendant in New York, however, has to prove, by a preponderance of the evidence, the affirmative defense of extreme emotional disturbance for which there is a reasonable explanation. 432 U.S. at 206, 53 L.Ed. at 289. Unlike Patterson, in McKenzie and Petitioner's appeal, the basic statutory element of intent in Deliberate Homicide is allowed to be presumed from the act causing the death. The basic discrepancy between Patterson and the Montana decisions in McKenzie and Petitioner's appeal, stems from the fact that "nothing was presumed or implied against Patterson." 432 U.S. at 216, 53 L.Ed.2d at 295. Patterson, in the area of presumptions, reaffirmed Mullaney.

> "Mullaney surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." 432 U.S. at 215, 53 L.Ed.2d at 295. (emphasis added)

By requiring the jury to presume the essential element of intent from the acts of the Petitioner, the trial court and the Montana Supreme Court denied Petitioner his Constitutional right to have that element proven beyond a reasonable doubt.

The Supreme Court of Montana, in the Petitioner's appeal, thus did not decide the due process question on the use of presumptions in criminal proceedings in accord with the Patterson, Mullaney, or Winship decisions.

III. JURY INSTRUCTIONS OF THE TYPE THE PETITIONER HEREIN COMPLAINS, HAVE BEEN HELD BY A NUMBER OF FEDERAL CIRCUIT COURTS OF APPEAL TO BE VIOLATIVE OF DUE PROCESS OF LAW.

Three Federal Circuit Courts of Appeal have expressly forbidden the use of presumption instructions virtually the same as Jury Instruction No. 5. The Fifth Circuit banned the so-called 'Mann' instruction, the same type of instruction the Petitioner herein contests, in 1963. Mann v. United States, 319 F.2d 404 (5th Cir. 1963). That same Circuit, after fourteen years, reaffirmed and strengthened its position against instructions presuming intent in United States v. Chiantese, 560 F.2d 1244 (5th Cir. 1977).

> "1. No district court in this circuit shall include in its charge to the jury an instruction on proof of intent which is couched in language which could reasonably be interpreted as shifting the burden to the accused to produce proof of innocence." 560 F.2d at 1255.

The Third Circuit has also banned the use of this type of instruction in the District Courts of that Circuit.

> "Hereafter, district courts in this circuit shall not use language in instructions that reasonably can be interpreted as shifting the burden to the accused to produce proof of innocence. This includes charges indicating that the law presumes a person to intend the natural and probable consequences of his knowing acts, as well as charges substantially similar to that given in this case." United States v. Garrett, 574 F.2d 778, 782 (3d Cir. 1978) (emphasis added).

In United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975), the Second Circuit stated its view on the use of an instruction which directed the jurors should presume that a person intends the

natural and probable consequences of his act.

> "We have for many years warned against the use of this type of a charge and are somewhat surprised at its continued use...[We wish] to take this opportunity to again stress our disapproval of the 'natural and probable consequences' charge and to remind trial judges that its continued use may jeopardize otherwise sound convictions." 529 F.2d at 159. See also, United States v. Erb, 543 F.2d 438, 447 (2d Cir. 1976) cert. denied 429 U.S. 981 (1976), and United States v. Robinson, 545 F.2d 301, 306 (2d Cir. 1976).

Two other Federal Circuit Courts, the Ninth Circuit and the Eighth Circuit, have also disapproved of intent-presumption instructions which, for all purposes, are identical to Jury Instruction No. 5. See, Bloch v. United States, 221 F.2d 786, 788-89 (9th Cir. 1955); Cohen v. United States, 378 F.2d 751, 755 (9th Cir. 1967) cert. denied 389 U.S. 897; United States v. Berzinski, 529 F.2d 590, 593-94 (8th Cir. 1976).

The rationale of all these Federal Circuit Court opinions is that the burden-shifting nature of intent-presumption instructions deprives the defendant of due process of law. These Circuit Court opinions are, of course, authority and precedent for the relief the Petitioner now requests because due process protection is required of the States through the Fourteenth Amendment to the United States Constitution. The opinions of the Second, Third, Fifth, Eighth, and Ninth Federal Circuit Courts of Appeal display that this question of federal substance and concern is deserving of the attention and guidance of this Court; not only because it is one of first impression, but also because it involves a vital area of Constitutional protections.

IV. PRESUMPTIONS IN MONTANA HAVE THE WEIGHT AND EFFECT OF EVIDENCE AND SHIFT THE BURDEN OF PROOF TO THE DEFENDANT.

It is explicitly clear from early Montana Court rulings and the Montana Rules of Evidence that a presumption has the weight and effect of evidence and stands until controverted by a preponderance of evidence to the contrary. Mont. R. Evid. 301 (b)(2) Commission Comment (1977). Rule 301 of the Montana Rules of Evidence defines

presumption:

> "A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action or proceeding." Id.(a) (emphasis added).

Rule 301 further describes the classification and effect of disputable presumptions.

> "A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption." Id. (b)(2).

This rule codifies earlier Montana case law. See Monaghan v. Standard Motor Co., 96 Mont. 165, 173-74, 29 P.2d 278 (1934).

Prior Montana case law, however, held that the use of presumptions, in criminal proceedings, was improperly burden-shifting and misleading. The Montana Court, for instance, prohibited the use of a presumption identical to Jury Instruction No. 5 because it was misleading to the jury. State v. Schaefer, 35 Mont. 217, 221, 88 P.792 (1907). State v. Garney, 122 Mont. 491, 493-95, 207 P.2d 506 (1949).

At Petitioner's trial, even though a presumption instruction was used, there was not one instruction given which defined the classification, nature, or effects of presumptions in criminal proceedings. The commonly-accepted meaning of 'presume,' as used in Jury Instruction No. 5, allowed the jury to believe the fact presumed without proof. See Webster's New Collegiate Dictionary 668 'presume" n.2 (6th ed. 1956). In other words, Jury Instruction No. 5 misled the jury to take for granted that the Petitioner had the requisite intent if his act was proven as causing Mrs. Jessen's death. The effect of Jury Instruction No. 5 was to direct the jury to accept, without question, the existence of 'purpose or knowledge' in the Petitioner's act. This deprived Petitioner of his 'due process' right to have every element of the charge against him proved beyond a reasonable doubt. Thus, whether the jury understood the word presume by its common meaning or by that word's meaning

under Montana law, Jury Instruction No. 5 would still fail to meet the Constitutional standards of the Due Process Clause. On one hand, the issue of intent would be virtually eliminated from the jurors' consideration while on the other hand, the Petitioner would be forced to prove, by a preponderance of the evidence, the nonexistence of specific intent; that is, purpose or knowledge.

V. THE ISSUE OF PETITIONER'S INTENT WAS PROPERLY RAISED BY THE TRIAL EVIDENCE AND SHOULD HAVE BEEN SUBMITTED TO THE JURY FOR A DETERMINATION OF INNOCENCE, OR GUILT BEYOND A REASONABLE DOUBT WITHOUT THE STATE HAVING BENEFIT OF A PRESUMPTION.

Petitioner's defense, at trial, was that he did not act purposely or knowingly. Jury Instruction No. 5, however, prevented the Petitioner of an adequate consideration of this defense. It was not disputed that Petitioner's acts caused the death of Mrs. Jessen, but Petitioner did dispute the finding that he had either purpose or knowledge as required under the Montana Deliberate Homicide statute. It was not the Petitioner's position that he suffered from a mental disease or defect which made it impossible for him to form the requisite intent to commit Deliberate Homicide. It was rather Petitioner's position that he did not in fact at that time and place deliberate upon or specifically intend to cause the death of Mrs. Jessen.

To display the absence of a criminal intent in his acts, Petitioner introduced the testimony of two expert witnesses at trial. Both expert witnesses, Dr. William Stratford, a psychiatrist practicing in Missoula, Montana and Dr. Michael Nash, a clinical psychologist practicing in Bozeman, Montana, examined the Petitioner. The men found that the Petitioner, a person of borderline intellectual retardation, suffered from a personality disorder marked by impulsiveness, aggressiveness, and a lack of planning.

Other evidence produced at trial displayed that the Petitioner had consumed a significant amount of alcohol prior to the fatal acts;

between three six-packs and a case of beer, and some whiskey. Both experts stated that this alcohol consumption intensified and worsened the Petitioner's existing long-term personality disorder. Both men were of the opinion that Petitioner did not intend to cause the death of Mrs. Jessen. Indeed, the testimony of Drs. Stratford and Nash displayed that a number of factors, including Petitioner's low intelligence, his personality characteristics, and his alcohol consumption, prevented him from forming the intent required by statute to commit the offense of Deliberate Homicide.

The question of Petitioner's intent, raised by the experts' testimony, was one of fact which properly should have been submitted to the jury for a determination of innocence or guilt beyond a reasonable doubt. The State, however, prejudged any conclusion on the subject of Petitioner's intent by requiring that vital element of the offense of Deliberate Homicide to be presumed from Petitioner's act. Petitioner's counsel made a timely objection to Instruction No. 5 upon the grounds of a violation of due process of law. As shown above, allowing one element of an offense to be presumed upon proof of another is not in accord with this Court's decisions in Winship, Mullaney, or Patterson. Indeed, allowing such a presumption to be made contravenes the basic Constitutional due process guarantees of proof beyond a reasonable doubt.

The questions raised by this petition are ones of first impression in this Court. It is evident from the disparity between the Supreme Court of Montana's decision in Petitioner's appeal and the decisions shown above from the Second, Third, Fifth, Eighth, and Ninth Federal Circuit Courts of Appeal, that guidance is needed in this vital area of federal substance and concern. Until such a ruling is made, jurisdictions, in which essential elements of crimes are allowed to be presumed, will continue to deprive

criminal defendants of their Constitutional rights under the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully Submitted,

September 8, 1978
Date

Byron W. Boggs
Byron W. Boggs
Attorney for Petitioner

PROOF OF SERVICE

I, BYRON W. BOGGS, Attorney for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on September 8, 1978, I served a copy of the foregoing petition on the State of Montana, Respondent herein, by mailing copies in duly addressed envelopes, with first class postage prepaid, to Mike Greely, Attorney General for the State of Montana, Helena, Montana 59601, and John Radonich, County Attorney, Deer Lodge County, Anaconda, Montana 59711; attorneys of record for Respondent.

Byron W. Boggs
Byron W. Boggs
Attorney for Petitioner
212 East Park Avenue
Anaconda, Montana 59711

APPENDIX A

No. 14064

IN THE SUPREME COURT OF THE STATE OF MONTANA

1978

STATE OF MONTANA,

Plaintiff and Respondent,

-vs-

DAVID SANDSTROM,

Defendant and Appellant.

Appeal from: District Court of the Third Judicial District, Honorable Robert J. Boyd, Judge presiding.

Counsel of Record:

For Appellant:

Byron Boggs argued, Anaconda, Montana

For Respondent:

Hon. Mike Greely, Attorney General, Helena, Montana
John Radonich argued, County Attorney, Anaconda, Montana

Submitted: May 3, 1978

Decided: JUN - 8 1978

Filed: JUN - 8 1978

Thomas J. Kearney
Clerk

Mr. Justice John Conway Harrison delivered the Opinion of the Court.

On November 1, 1976, Mrs. Annie Jessen, 89 years of age, was found dead in her home in Anaconda, Montana, the apparent victim of a brutal assault in which she received blows to her head from a shovel, and five stab wounds to her back from a kitchen knife. Mrs. Jessen had, in addition, been sexually assaulted and received a compound fracture to her leg, apparently after the slaying.

On November 22, 1976, defendant, 18 years of age, was arrested for an unrelated crime. Shortly thereafter, and while in custody of the Deer Lodge County sheriff, defendant confessed to the slaying of Mrs. Jessen. The confession was subsequently corroborated by certain physical evidence.

Based upon the confession and supporting evidence, defendant was charged, by an Information filed December 2, 1976, with the crime of deliberate homicide, in violation of section 94-5-102, R.C.M. 1947.

At the arraignment on the charge, defendant entered a plea of "not guilty" and filed a notice of intent to rely on mental disease or defect excluding criminal responsibility, as a defense.

Defense counsel subsequently moved for a change of venue, based upon allegedly prejudicial pretrial publicity. The motion was heard on July 6, 1977 in the District Court, Deer Lodge County. Defendant presented the testimony of four witnesses. Three of the four witnesses testified that, despite their perception that many Anaconda area residents had formed some opinion concerning the case, the defendant could receive a fair trial in Deer Lodge County. The fourth witness, Oscar Sandstrom, the father of defendant, testified primarily concerning abusive phone calls he had received following his son's arrest. The motion was denied with leave to renew at the time of jury selection.

The trial on the charge commenced on July 18, 1977. Defendant's renewed motion for change of venue was denied. Defendant further moved that the jurors be examined in voir dire individually and in segregation, which motion was also denied. Following voir dire, defendant again renewed his motion for change of venue. The motion was again denied.

In his opening statement, defense counsel informed the jury that defendant no longer intended to rely on the defense of mental disease or defect. The decision to so inform the jury appears to have been based on the reports of two psychiatrists who had examined defendant and determined he was able to appreciate the consequences of his actions, despite his low intelligence level and aggressive/impulsive personality.

The case-in-chief for the state consisted of defendant's confession, together with the corroborating physical and circumstantial evidence. Defendant called as witnesses the two psychiatrists who had examined defendant prior to trial. The witnesses testified that, while defendant may not have had the specific intent to kill at the time of the offense, it was their opinion that he had the intent to "silence" Mrs. Jessen, and was conscious of his activity in bringing about the result.

Following the reception of evidence and upon their deliberations, the jury returned a verdict convicting defendant of the crime as charged. Defendant was subsequently sentenced to 100 years imprisonment in the Montana State Prison.

Defendant appeals the judgment of conviction, entered upon the verdict of the jury.

Defendant raises two issues for review: (1) Did the District Court abuse its discretion in denying defendant's motions for change of venue? and (2) Did the District Court err in giving court's instruction No. 5?

Defendant first argues that the District Court abused its

discretion in denying his three motions for change of venue on the grounds an impartial trial could not be afforded defendant in Deer Lodge County. It is maintained the pretrial publicity, given the nature of the crime in this case, rendered selection of an impartial jury impossible.

The applicable statute in this regard, section 95-1710(a), R.C.M. 1947, states:

> "The defendant * * * may move for a change of place of trial on the grounds that there exists in the county in which the charge is pending such prejudice that a fair trial cannot be had in such county."

Accordingly, it is well settled that granting a change of venue in a criminal trial is within the sound discretion of the trial court, and the denial of a motion for change of venue will only be reversed upon a showing of an abuse of discretion. State ex rel. Hanrahan v. District Court, (1965), 145 Mont. 501, 401 P.2d 770; State v. Corliss, (1967), 150 Mont. 40, 430 P.2d 632; State v. Olson, (1971), 156 Mont. 339, 480 P.2d 822.

It has been held that mere publication of a news story dealing with the facts and circumstances of the crime is not a sufficient basis for change of venue. Published accounts of crimes are not considered prejudicial unless so passionate as to excite undue prejudice, rendering it impossible to empanel a trial jury free from prejudice against the defendant. State ex rel. Hanrahan v. District Court, supra; State v. Corliss, supra.

Defendant relies on Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1938), and State v. Dryman, (1954), 127 Mont. 579, 269 P.2d 796, as authority for reversing a conviction in which change of venue had been denied, despite adverse pretrial publicity. The cases, however, are clearly distinguishable on the basis of the volume and content of the publicity.

Here, the publicity under consideration consists of 17 newspaper articles concerning various aspects of the crime, the investigation, and the subsequent arrest of defendant. Two of the articles, published after defendant's arrest, contain a picture of defendant in police custody.

Considering the nature of the crime involved, we find the reporting extremely objective and factual. Further, we do not consider the amount of publicity given to the crime and ensuing events in this case to be unreasonably voluminous. We conclude that there was no abuse of discretion in the District Court's refusal to grant defendant's motion for change of venue.

It is significant to note that the witnesses at the hearing on defendant's initial motion for change of venue, with the sole exception of defendant's father, testified they believed defendant would receive a fair trial in Deer Lodge County, despite the pretrial publicity and existence of some measure of adverse public opinion.

Further, while certain of the twelve empaneled jurors had read or heard something regarding the crime, there exists no requirement that jurors be totally ignorant of the facts involved in the case before them. It is sufficient if the juror can lay aside any impressions or opinions and render a verdict based upon the evidence presented at the trial. State v. Moran, (1963), 142 Mont. 423, 384 P.2d 777; State v. Simpson, (1939), 109 Mont. 198, 95 P.2d 761.

Defendant next contends the District Court erred in giving court's instruction No. 5 to the jury. Instruction No. 5 states:

> "The law presumes that a person intends the ordinary consequences of his voluntary acts."

The given instruction paraphrases the language of section 93-1301-7(3), R.C.M. 1947, giving rise to the rebuttable presumption.

Defendant, in essence, contends the given instruction shifts to a defendant the burden of disproving an element of the crime charged, i.e. intent. It is maintained the state is thus relieved from proving an essential element of the crime charged, contrary to recent pronouncements of the United States Supreme Court. In re Winship, (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L Ed 2d 368; Mullaney v. Wilbur, (1975), 421 U.S. 684, 95 S.Ct. 1881, 44 L Ed 2d 508; Patterson v. New York, (1977), 432 U.S. 197, 97 S.Ct. 2319, 53 L Ed 2d 281.

The recent decisions relied on by defendant generally prohibit, under the auspices of the due process clause, shifting to a defendant, such as by presumption, the burden of proof regarding an essential element of the offense, most typically the element of criminal intent. In re Winship, supra; Mullaney v. Wilbur, supra; Patterson v. New York, supra. However, such cases do not prohibit allocation of some burden of proof to a defendant under certain circumstances. Rather, the concern expressed in such cases is that the State prove every element of the offense charged as that offense is defined by state law. State v. McKenzie, (No. 13011, Decided June 7, 1978).

Moreover, an instruction similar in effect to that under consideration here has received recent consideration and approval by this Court in State v. Coleman, ___Mont.___, ___P.2d___, 35 St.Rep. 560. In fact, the very instruction was approved by this Court in State v. McKenzie, supra, by the following language:

> "The presumptions that an unlawful act was done with unlawful intent, and that a person intends the ordinary consequences of his voluntary act, have been a part of Montana law since 1895. This Court has previously approved the use of these presumptions in criminal cases on the issue of intent. State v. Caryl, (1975), 168 Mont. 414, 426, 543 P.2d 389; State v. McLeod, (1957), 131 Mont. 478, 489, 311 P.2d 400, 407. See also State v. Jones, (1963), 143 Mont. 155, 181, 387 P.2d 913. The conclusions drawn through the use of these presumptions are generally fair and reasonable ways to ascertain intent which, of course, can never be proved directly * * *." ___St.Rep.___.

A review of the transcript of the trial in this case demonstrates that the State satisfied its burden of proof of each of the elements of the offense charged, including the element of intent. Defendant's sole burden under instruction No. 5 was to produce some evidence that he did not intend the ordinary consequences of his voluntary acts, not to disprove that he acted "purposely" or "knowingly". We hold the instruction does not violate due process standards as defined by the United States or Montana Constitution, and as interpreted by relevant case authority, and therefore does not constitute reversible error.

The conviction of defendant is affirmed.

John Conway Harrison
Justice

We concur:

Frank I. Haswell
Chief Justice

Gene B. Daly

David J. Shea

John C. Sheehy
Justices

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 14064

STATE OF MONTANA,

Plaintiff and Respondent,

vs.

DAVID SANDSTROM,

Defendant and Appellant.

ORDER

PER CURIAM:

Appellant's petition for rehearing in the above named cause having been filed, and the same considered by this Court,

IT IS HEREBY ORDERED that the petition for rehearing in the above named cause is denied.

DATED this 28th day of June, 1978

Frank I. Haswell
Chief Justice

Gene B. Daly

John Conway Harrison

John C. Sheehy
Justices

In the Supreme Court of the State of Montana

June 30th 78

Helen Kelley

14064
D.C.#2877

March Term A. D. 1978

The Chief Justice of the Supreme Court of the State of Montana:

To the Honorable Judge of the District Court of the Third *Judicial District, in and for the County of* Deer Lodge *Greeting:*

WHEREAS, In the said District Court in a cause between State of Montana

Plaintiff... and Respondent *and* David Sandstrom

Defendant... and Appellant *wherein the* Judgment *of the said District Court, entered in said cause on the* 11th *day of* August *A. D. 19* 77

was in favor of the said Plaintiff *and* Respondent *and against the said* Defendant *and* Appellant

as by the inspection of the transcript of the record of said Court in said cause which was brought into the Supreme Court of said State by virtue of an appeal, agreeably to the statute of said State and the rules of said Supreme Court in such case made and provided, fully and at large appears.

AND WHEREAS, in the March *term of court in the year of our Lord, one thousand nine hundred and* seventy-eight *said cause came on to be heard before said Supreme Court and was argued by counsel.*

-App. A p. -22-

-App. A p. -22-

that the Judgment *of the Court below, entered in this cause on the* 11th *day of* August *A. D. 1977*

is affirmed.

Costs in this Court:

Appellant Appearance - $ none

Respondent Appearance - $ none

Remittitur - - - - - - $ none

June 8 *A. D. 19*78

You, THEREFORE, are hereby commanded that such further proceedings be had in said cause as, according to right and justice, and the laws of the State of Montana ought to be had, not inconsistent with the opinion hereto attached.

WITNESS: The Honorable Frank I. Haswell *Chief Justice of the Supreme Court of the State of Montana, this* 29th *day of* June *A. D. 1978*

Richard T Conboy

Deputy Clerk of the Supreme Court of the State of Montana.

-300-
STATE PUBLISHING CO

-App. A p. -23-

-App. A p. -23-

Filed July 25 1977
Helen Meloy, Clerk
Gloria Lord
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF DEER LODGE

STATE OF MONTANA,
Plaintiff,
-vs-
DAVID SANDSTROM,
Defendant.

No. 2878

J U D G M E N T

After written waiver of preliminary hearing by the defendant, David Sandstrom, and Order of Justice of the Peace John Sajcich binding the defendant over to District Court for trial, a criminal Information was filed on December 2, 1976, by the County Attorney for Deer Lodge County as attorney for the State of Montana, charging the defendant with the following FELONY: Burglary, in violation of Section 94-6-204(1), R.C.M. 1947, as amended, committed on or about November 12, 1976.

The defendant was arraigned on December 3, 1976, and advised of the nature of the charges against him, of the maximum sentence after a plea or verdict of guilty, of his right to a jury trial, and of his right to counsel, either retained by the defendant or appointed by the court if the defendant was indigent.

The defendant was thereafter represented by Public Defender, Byron Boggs, as counsel and on July 19, 1977, entered a plea of guilty to the above criminal charge.

The defendant appeared in open court on July 25, 1977, and was asked if he had any legal cause to show why sentence and judgment of the court should not be imposed at that time, and the defendant replied in the negative;

NOW, THEREFORE, it is the sentence and judgment of the court as follows:

1. The defendant shall be imprisoned in the State Prison at Deer Lodge, Montana, for a period of ten (10) years;

2. The defendant shall receive a total credit of two hundred forty nine (249) days for time served in jail prior to sentencing;

The defendant is hereby remanded to the custody of the Sheriff of Anaconda--Deer Lodge County for transportation to the State Prison for execution of this the sentence and judgment of the court.

Dated this 25th day of July, 1977.

Robert H. Boyd
District Judge

STATE OF MONTANA }
County of Deer Lodge } ss.

I, HELEN MELOY, Clerk of the District Court of the Third Judicial District of the State of Montana, in and for the County of Deer Lodge, do hereby certify that the above is a full, true and correct copy of the original as the same appears in the files and records of this office.

WITNESS my Hand and Seal of this Court this 21st day of Aug., 1978

Clerk

By Angela Kiesler Deputy

CERTIFIED COPY

July 25 '77
Angela Kiesen

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF DEER LODGE

STATE OF MONTANA,
Plaintiff,
-vs-
DAVID SANDSTROM,
Defendant.

Cause No. 2877

MF 4 773

V E R D I C T

Deliberate Homicide

We, the jury in the above entitled action find the defendant, DAVID SANDSTROM, guilty of the crime of deliberate homicide.

Dated this 21 day of July, 1977.

Robert L Buhl
Foreman

STATE OF MONTANA,) ss
County of Deer Lodge.)

I, HELEN McCOY, Clerk of the District Court of the Third Judicial District of the State of Montana, in and for the County of Deer Lodge, do hereby certify that the above is a full, true and correct copy of the original as the same appears in the files and records of this office.

WITNESS my Hand and Seal of this Court this 21st day of Aug 1978

Clerk

By Angela Kiesen Deputy

APPENDIX B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF DEER LODGE

* * * * * * * * * * *

STATE OF MONTANA,
Plaintiff,
-vs-
DAVID SANDSTROM,
Defendant.

NO.

I N F O R M A T I O N

* * * * * * * * * * *

COMES NOW Joseph C. Connors, Deer Lodge County Attorney, as attorney for the State of Montana, after the Defendant, David Sandstrom, having waived and refused a preliminary examination in Justice Court and Justice of the Peace, John M. Sajcich, having bound the defendant over to District Court for further proceedings, and, therefore, the undersigned accuses David Sandstrom with the crime of Deliberate Homicide, a felony, in violation of Section 94-5-102, committed in Deer Lodge County, Montana, as follows:

On or about November 1, 1976, in Deer Lodge County, Montana, the defendant, David Sandstrom, purposely or knowingly caused the death of Annie Jessen by stabbing the said Annie Jessen in the back with a knife, which was in violation of the above statute and against the peace and dignity of the State of Montana.

The maximum sentence for said offense is imprisonment in the State Prison for any term not to exceed one hundred (100) years.

December 2, 1976.

/s/ Joseph C. Connors
Deer Lodge County Attorney
Attorney for the State of Montana

Supreme Court, U. S.
FILED
FEB 12 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5384

DAVID SANDSTROM,

Petitioner,

—*v.*—

STATE OF MONTANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR CERTIORARI FILED SEPTEMBER 12, 1978
CERTIORARI GRANTED JANUARY 8, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5384

DAVID SANDSTROM,

Petitioner,

—*v.*—

STATE OF MONTANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

INDEX

	Page
Relevant Docket Entries	1
Information	3
Official Transcript of Arraignment	4
That Portion of Petitioner's Attorney's Opening Remarks Wherein He Informed The Court And Jury of His Intent To Contest The Proof on The Element of Purpose or Knowledge	6
Petitioner's Confession	9
Testimony Offered In Petitioner's Defense By a Psychiatrist And Psychologist Contesting The Element Of Purpose or Knowledge	12
The Colloquy Between The Court And Petitioner's Attorney With Respect To The Instruction Here At Issue	34
Instruction 3	34
Instruction 4	35
Instruction 5	35
Instruction 6	35
Instruction 7	35

Page

Instruction 8 36
Instruction 9 36
Instruction 10 36
Instruction 11 36
Instruction 12 36
Instruction 13 37
Instruction 14 37
Instruction 15 37
Verdict 38
Judgment 39
Order of Commitment To Montana State Penitentiary 42
Opinion of Montana Supreme Court on Appeal 45
Remittitur and Judgment of Montana Supreme Court on Appeal 52
Order of Montana Supreme Court Denying Petition for Rehearing 54
Order of the Supreme Court of the United States Granting Motion for Leave to Proceed In Forma Pauperis and Granting Petition for Writ of Certiorari 55

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT OF THE
STATE OF MONTANA
IN AND FOR THE
COUNTY OF DEER LODGE

No. 2877

STATE OF MONTANA, PLAINTIFF

—*vs.*—

DAVID SANDSTROM, DEFENDANT

RELEVANT DOCKET ENTRIES

December 3, 1976

Refusal and Waiver of Preliminary Examination filed.
Bail fixed at $100,000.00 filed.
Information filed.

December 8, 1976

This being time set for entry of plea, let the records show the Defendant is present in Court with his counsel Byron Boggs. At this time Mr. Boggs informed the Court that his client enters a plea of "Not Guilty" and also handed the Court a Notice of Purpose to Rely on the Defense of Mental Disease and Defect excluding responsibility. Defendant is remanded to the custody of the Sheriff until further order of this Court and until counsel for the Defendant has a chance to review the matter further.

December 15, 1976

Motion for psychiatric examination of Defendant filed.

December 22, 1976

Order for psychiatric examination of the Defendant filed.

February 18, 1977

Affidavit filed.

March 18, 1977

Defendant's Motion for Entry of Judgment of Acquittal on the Grounds of Mental Disease or Defect Excluding Responsibility filed.

July 18, 1977

This is the time set for Jury Trial. Defendant is present in Court with his attorney Byron Boggs. The State is represented by County Attorney John Radonich and Deputy County Attorney Joseph Connors. The matter is to be heard before the Honorable Robert J. Boyd.

July 21, 1977

Counsel stipulated all jurors present. Court in session. The Judge read the Instructions to the jurors. Connors makes his summation. Boggs makes his summation. Radonich concluded. The Jury deliberated at 11:15. The Jurors returned to the Courtroom at 2:25 o'clock. Robert Buhl—Jury foreman gave the verdict to the Bailiff which he presented to the Judge, then to the Clerk to be read. The Verdict—Deliberate Homicide. Sentencing July 25, 1977, Monday at 10:00 o'clock A.M. Court adjourned at 2:30. Defendant remanded to the custody of the Sheriff.

July 25, 1977

Verdict—Deliberate Homicide filed.

July 26, 1977

Commitment to State Penitentiary filed.

August 12, 1977

Notice of Appeal filed.

June 30, 1978

Remittitur and copy of opinion filed.

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT OF THE
STATE OF MONTANA
IN AND FOR THE
COUNTY OF DEER LODGE

No. 2877

STATE OF MONTANA, PLAINTIFF

—vs.—

DAVID SANDSTROM, DEFENDANT

INFORMATION—Filed Dec. 3, 1976

COMES NOW Joseph C. Connors, Deer Lodge County Attorney, as attorney for the State of Montana, after the Defendant, David Sandstrom, having waived and refused a preliminary examination in Justice Court and Justice of the Peace, John M. Sajcich, having bound the defendant over to District Court for further proceedings, and, therefore, the undersigned accuses David Sandstrom with the crime of Deliberate Homicide, a felony, in violation of Section 94-5-102, committed in Deer Lodge County, Montana, as follows:

On or about November 1, 1976, in Deer Lodge County, Montana, the defendant, David Sandstrom, purposely or knowingly caused the death of Annie Jessen by stabbing the said Annie Jessen in the back with a knife, which was in violation of the above statute and against the peace and dignity of the State of Montana.

The maximum sentence for said offense is imprisonment in the State Prison for any term not to exceed one hundred (100) years.

December 2, 1976.

/s/ Joseph C. Connors
Deer Lodge County Attorney
Attorney for the State of Montana

OFFICIAL TRANSCRIPT OF ARRAIGNMENT

No. 2877

Filed Dec. 8, 1976

STATE

v.

DAVID SANDSTROM

JACK SCANLON DEPUTY COUNTY ATTORNEY appearing for the State.

BYRON BOGGS, PUBLIC DEFENDER, appearing for the Defendant.

BE IT REMEMBERED that the above matter came on for Hearing before the HON. ROBERT J. BOYD, Judge, on the 8th of December, 1976, in the Deer Lodge County Courthouse.

THE COURT: Let the record show that the Defendant, David Sandstrom, appeared before this Court on the 3rd day of December, 1976, answered to his true name and at the request of counsel additional time was granted for entry of plea. Are you prepared to enter a plea at this time?

MR. BOGGS: At this time, Your Honor, the Defendant would like to enter a plea of not guilty and I would hand the Court a Notice of purpose to rely on the defense of Mental Disease or Defect Excluding Responsibility.

THE COURT: Is counsel going to make a Motion for Evaluation or do it privately?

MR. BOGGS: I would like to review that matter for a little additional period before I decide which way to go on that.

THE COURT: The Defendant is remanded to the custody of the Sheriff of Deer Lodge County until further Order of the Court.

(Hearing concluded.)

THAT PORTION OF PETITIONER'S ATTORNEY'S OPENING REMARKS WHEREIN HE INFORMED THE COURT AND JURY OF HIS INTENT TO CONTEST THE PROOF ON THE ELEMENT OF PURPOSE OR KNOWLEDGE. [Official Transcript pages 204 line 13 through 207 line 25].

THE COURT: The Defendant may make his opening statement.

MR. BOGGS: Thank you. Ladies and gentlemen of the jury, I ask for your complete attention because I believe it is very important that you understand the posture that the defense will take in this case.

It may be somewhat different than the impressions you have gotten if you read the newspaper account and I think it needs to be thoroughly explained to you.

As was stated by Mr. Connors, there was a confession in this case. The Defendant David Sandstrom will not repeat that confession. He admits the facts that are stated in that confession. And in that confession it is stated that he took the life of Annie Jessen. It is further stated that he sexually abused Mrs. Jessen after her death. These facts will be admitted too. The issue that will be presented to you upon those facts is the question of what crime is constituted from the facts. The charge is deliberate homicide in that David Sandstrom took Mrs. Jessen's live knowingly or purposely. It is the position of the defense based on the facts and the facts that will primarily inform you as to the events of that night—it will be stated in the confession there were circumstantial evidence as stated by Mr. Connors that will corroborate the truthfulness of the confession.

I do not know and I do not expect that there will be any evidence, presented to you which will contradict the confession in any respect. Based on those facts it will be the defense posture that the element of the crime of deliberate homicide, that the Defendant David Sandstrom acted knowingly or purposely is not true.

As was discussed with you when you were being chosen as jurors I did file in this case a notice of intent to rely on the defense of mental defect or disease. I believe

it will be the testimony of the witnesses, the professional psychologist, and psychiatrist that I will ask to take the stand, that David Sandstrom does not suffer any mental disease or defect that will excuse him for the conduct at that time. And, therefore, I would not ask you to find that he be excused of this conduct on that basis, but as I told you during the voir dire the initial plea, and the plea remains, in this case is the plea of not guilty and understand that with that plea the State must prove every element of the crime beyond a reasonable doubt, and that the element of the crime we do not believe can be proved is the element of knowingly or purposely doing the act.

The facts that we will rely on for this defense will be, as I say, primarily those of the confession and specifically that on the night in question David Sandstrom was drunk. Now, the degree of drunkenness no one will be able to know, but you will have to judge that from the testimony here. Beyond that the professional mental health people, who as I will call, will testify as to their opinion as to his health state at that time. They will state that their opinion based on their understanding of his personality that he does not plan, that he is a borderline retarded person, that acting under the influence of alcohol and possibly drunk he took the life of Mrs. Jessen and impulsively without thinking acted under the influence of a situation that he simply could not comprehend in the sense that he deliberated and comprehended in our situations. There will be asked of you by the prosecution to find an additional fact in this case and that is that the Defendant took the life of Mrs. Jessen pursuant to a plan of lying in wait. I do not believe the facts in this case will warrant such a conclusion.

I listened to Mr. Connors as he described the facts, I did not see in those facts such a plan of lying in wait, and I do not believe that you will find them in the confession as it is stated and there is no other evidence that I am aware of that contradicts this in any way to such an opinion.

I will ask the Court not to submit that question to you because I do not believe there will be any facts to

base such an opinion. If the question is submitted to you it will be the defense posture that it is not a fact. As we said during the selection of the jury I expect this case to arouse your emotions perhaps as strongly as they can be aroused. I also expect that you will put these emotions aside and apply the law that will be given to you by the Court to the facts as you will hear them and I will ask of you at that time to look at the consequences and return a verdict of not guilty of deliberate homicide requested by the prosecutor but a verdict of mitigated homicide based on the position that the Defendant did not act with knowledge or purpose in taking Mrs. Jessen's life. Thank you.

STATE'S EXHIBIT 16

PETITIONER'S CONFESSION

DATE: 11-22-76
TIME: 11:34 A.M.

IN REFERENCE TO ANN JESSEN CASE

This statement was given to Terry Wilkinson, Detective, Anaconda Police Department, by me, David Sandstrom, of my own free will, with no coercion or threats of any kind.

On October 31, 1976, I was home giving out candy to the trickie-treaters. This was at about 7:00 P.M. I kept giving out candy until 11:30 P.M. or 12:00 Midnight. I left and went down town. I was walking around, looking for a place to drink. Terry Hayes and Gary Rettinger drove up and asked me if I wanted to go and ride around. I went with them. They gave me a can of beer. We were riding around and I asked them if they wanted to go to Butte. They said "yes".

We then went up to the Circle K and got some gas, and I bought two six packs of beer. We left for Butte and drove around over there for awhile. Our first stop was Harrington's Bar. Myself and Gary went in and played some foos ball and had a beer. Then we left and went down to the Dry Gulch Bar. We all went in the bar, but couldn't get served because Hayes never had an I.D.

We left there and rode around and ended up at Charlie's New Deal. I went in the bar by myself. I met Rick Cole, Mariann Petra there. We had a few beers there. I went out and got Terry and Gary and bought them in. They never had anything to drink.

They were telling us to leave the bar because of closing hours. I brought a case of beer and a pint of whiskey (Kesslers). A bunch of us left the bar and went up to Joe Sisner's sister's house to have a party. It was around 3:00 A.M., November 1, 1976, when we started to run out of beer. Myself and Terry Hayes, Gary Rettinger,

Mariann Petra went down to the M-M Bar and got another case of beer. We went back up to the house where the party was going on. We were drinking up there again. We were getting short of beer and we went down to the M-M bar and got two more six packs of beer. This was around 4:00 A.M., November 1, 1976.

We drove around for a few minutes and went up to Mariann Petra's sister's house, where she was staying then.

Myself, Terry Hayes, Gary Rettinger took Mariann Petra home. It was around 4:30 A.M. at this time and we started back home. We had some beer left, and I had a few cans on the way home.

We came into town, and dropped Gary Rettinger at his house. Then we, Terry and I, were going west to take me home. We got by the Safeway and I told him to drop me off on the corner.

I walked up Larch Street and up the alley to the end and took a right and walked towards Ogden Street.

I went towards the creek and sat down for a few minutes. I started to think about robbing someplace and I thought about the Jessen place. So I got up and walked across the bridge and up the road. I walked around the house to see if anyone was there. The kitchen light was on. I thought no one was there. There was a shovel next to the house and I threw it through the window. I ran over by the chicken house and hid for a little bit. I then went back to the house, and no one was around. I pulled some glass out of the window sill and crawled through the window. I was looking through the house. I was in the bedroom off the kitchen. I was in there looking around and she came out. She didn't see me. She went over to the broken window and was asking, "Who's there?" I came out and went over and grabbed her and she started to scream.

I got worried that someone would hear her, so I picked up the shovel and hit her with it. I hit her in the back of the head. I thought it would stop her from screaming, but it never. I couldn't understand what she was screaming about.

She started to wheel her wheel chair and I got scared and didn't know what to do. There was a knife laying up on the counter, so I grabbed that and stabbed her. I stabbed her in the back five times. The knife went through the back of the wheel chair. She quit moving around and there was blood all over the place. I pulled her out of the wheel chair. Her skirt or whatever ripped.

I tried dragging her into the next room, but the skirt kept ripping, so I left her. I went into her bedroom and looked through a few of the drawers. I went in the closet and found a rifle, a .22, and took it out. I looked at it and just threw it on the bed. I was really drunk, having a hard time walking.

I went out in the kitchen and didn't realize what I was doing when I raped her. I don't remember going into the bathroom. When I finally came to my senses and realized what I was doing, I went to get up and slipped. This is when her leg got broken. I got up and went out the door and left. I took the knife with me. I never took anything else from the house. When I got down to the bridge, I threw the knife in the creek, then I went home. I got home around 6:00 A.M. or a little after.

My dad was up and my mom got up. They asked me where I was and I said I was at a party. I then went to bed.

The first time I hit her with the shovel she was facing the bedroom off the kitchen. She never stopped screaming. I took the knife off the counter and kind of grabbed her the same time. I started to stab her and pulling her back towards the sink—all in one motion.

I declare that the above statement is made to the aforesaid person, Terry Wilkinson, of my own free will without promise or threat, without fear or threat of physical harm, without coercion, favor or offer of favor, without leniency or offer of leniency, by any person or persons whomsoever.

/s/ David Sandstrom—11-23-76

Witness:

/s/ Terry Wilkinson—11-23-76

TESTIMONY OFFERED IN PETITIONER'S DEFENSE BY A PSYCHOLOGIST AND PSYCHIATRIST CONTESTING THE ELEMENT OF PURPOSE OR KNOWLEDGE. [Official Transcript pages 293 line 9 through 328 line 14].

DR. WILLIAM STRATFORD

was called as a witness, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BOGGS:

Q. Please state your name.
A. My name is William Stratford.
Q. And you are a doctor of psychiatry, isn't that true?
A. I am a medical doctor and specialize in the practice of psychiatry.
Q. Would you tell us Dr. Stratford what your education and training has been to achieve that status?
A. Certainly. I had premedical education at the University of Utah. I attended medical school at the University of Tennessee in Memphis. Did a rotating medical internship with a hospital associated with the University of Utah Medical Center. Then did a three-year general psychiatric residency at the University of Utah Medical Center and a four-year fellowship in child psychiatry at the same facility before going into private practice.
Q. And what is your present practice?
A. My present practice is in Missoula, Montana, and consists of approximately 30 to 40 percent forensic or legal cases, another 30 to 40 percent of adult—both in and out patients and 15 to 20 percent child psychiatry.
Q. Now, when you say forensic cases that refers to criminal?
A. Right.
Q. And in that connection that is with the Montana State Prison?
A. Partly, I am consulting psychiatrist with the Montana State Prison for the last—over the last two years examining inmates there. That is a part of my private practice, I examine criminals for various attorneys and courts.

Q. Approximately how many cases were you asked to examine persons in regards to criminal cases?
A. Well, considering civil as well as criminal cases, I have testified in courts of law over 1,200 times.
Q. Now, you were ordered to conduct an examination of the Defendant David Sandstrom, were you not?
A. Yes, I was.
Q. And did you make such an examination, isn't that true?
A. Yes, sir.
Q. I would like for you to describe to the jury the results of that examination of Mr. Sandstrom as far as it pertains to his intelligence and personality factors.
A. Certainly. I had an occasion to examine Mr. Sandstrom on January 24th of this year here in Aanaconda. I talked to him about the circumstances of the crime. I had an occasion to talk to Mr. Sandstrom about his past experiences, education, prior behavior in lots of different areas. And I administered to him what a psychiatrist refers to as a mental status examination, which is a detail checklist—sort of a way of checking a person's intelligence. They are emotional makeups ascertaining certain traits about an individual, trying to tell whether or not the person is in fact psychotic and trying also to assess their intelligence.

As a result of my examination of Mr. Sandstrom I was able to formulate, and did write a letter to the Court which did indicate that Mr. Sandstrom has an I.Q. that is somewhat less than normal, but that he is not defective in terms of his intelligence.

In my opinion he is not now psychotic nor was he at the time of the crime, he is not suffering from mental disease in my opinion. In my opinion what he does suffer from is a long-term personality disturbance, which is characterized by the impulsive aggressiveness, a sense of immediacy. He is encumbered by an inordinate amount of conscience—he does not particularly feel guilty about

his behavior and will engage in that behavior, particularly —readily under the influence of any chemical intoxicant such as alcohol.

Q. Doctor, when you stated that he had a less than normal intelligence, is that—is it possible to estimate the intelligence in terms of the familiar I.Q.?

A. Certainly. His I.Q. was 79.

Q. And how does that relate to a normal I.Q.?

A. Normal I.Q. is 90 to 110.

Q. And how would that relate—relate to an I.Q. with a mental defect?

A. In my opinion an I.Q. that would constitute a mental defect is an I.Q. of 69 or below.

Q. Now, Doctor, you were describing the personality of David Sandstrom and you stated that he was not actually defective, I think that is the exact word you used, but the impression you have is impulsive?

A. Yes, sir. Would you like me to explain that?

Q. Yes, would you try to explain that.

A. Certainly. Many times people engage in activity and they will plant it or give some thought to the consequences of their behavior. Impulsive refers to the lack of that planning. It is in essence the immediacy or jumping to the event or the circumstances in an impulsive way without the planning or forethought and with no concern for the consequences that often times people do possess.

Q. Now, reading from the letter that you—that you wrote earlier to the Court—

MR. RADONICH: Which I am going to object as hearsay.

MR. BOGGS: I will phrase it as a question.

MR. RADONICH: I will withdraw the objection.

BY MR. BOGGS:

Q. Would you say that Mr. Sandstrom's personality shows a lack of planning?

A. Characteristically, yes. Characteristically in my opinion he is an impulsive individual who does not spend a large amount of time in planning for the future or planning to—in terms of current events, nor does he have the capacity generally to follow through with planning such as a—for example a job or education, he lacks

the ability to stick to a task and complete it, generally speaking.

Q. Now, would you say that Mr. Sandstrom suffers a personality disorder?

A. Yes, I would.

Q. But it is not a psychosis?

A. That is right, it is not a psychosis, it is not a mental disease and not a mental defect, it is a personality disorder.

Q. Now, would you say that this personality disorder could reach a severe degree if under the influence of alcohol?

A. Yes, whatever personality trait Mr. Sandstrom does exhibit would be worsened under the influence of alcohol, which I think is—would be a common experience of anyone here if reflecting upon whom they have known and who have been sober at one point and drinking at another point, they could see generally in their behavior —it would worsen Mr. Sandstrom's traits.

Q. Now, I think you have already stated your opinion on this for us, but for clarification, for the benefit of the jury, I will ask you—you are familiar with meaning of the term mental disease or defect that is the opinion in the Montana Criminal Code, is that true?

A. Yes.

Q. What is your opinion as to whether or not David Sandstrom suffers from a mental disease or defect in the meaning of those terms?

A. My opinion—he does not suffer from a mental disease or defect within the context of those terms.

Q. Now, you are aware of the facts that constituted the death of Mrs. Jessen, are you not?

A. Yes, sir.

Q. And have you read the confession of David Sandstrom in this case?

A. Yes.

Q. I will ask you was there anything in your examination that caused you to doubt the facts stated in the confession?

A. No.

Q. Well then, I would ask you to assume those facts for the purpose of this question. And I would ask you

do you have an opinion as to whether David Sandstrom deliberated on the death of Mrs. Jessen?

MR. CONNORS: Objection, Your Honor, that is not a point of law which the Defendant is charged. The deliberation is not the test.

MR. BOGGS: Your Honor, the comment to the section under which Mr. Sandstrom is charge states that the section relates only to conduct that is done deliberately.

THE COURT: Overruled.

BY MR. BOGGS:

Q. Do you understand the question, Doctor?

A. I understand the question, I am not sure of the context when you are using the word deliberation. If you use it in the sense that it was planned, I don't think that it was planned to cause her death. If you are using the term deliberation to indicate that he perhaps purposely inflicted damage upon her in the deliberate sense, using the word in that context, I think that is true, he did deliberately do that. He did deliberately harm her.

Q. Do you believe that he formed the intention to take her life?

MR. RADONICH: We object, that invades the province of the jury, what his intention was.

THE COURT: Overruled.

THE WITNESS: Would you rephrase that, sir.

BY MR. BOGGS:

Q. Well, I would not rephrase it. The question is—

THE COURT: Have the reporter read it back then, counsel.

(Whereupon last question read back by reporter.)

THE WITNESS: In my opinion his intention was to silence Mrs. Jessen.

BY MR. BOGGS:

Q. Then, you are thinking of the facts stated in the confession that Mrs. Jessen was screaming, do you recall that from the confession?

A. Yes.

Q. And you believe his intention was to stop her from screaming?

A. Yes.

Q. Now, it has been suggested by the prosecution in this case that the death of Mrs. Jessen was pursuant to a plan of David Sandstrom to lie in wait for Mrs. Jessen. Now, do you have an opinion whether in fact there was any such plan to lie in wait?

MR. CONNORS: Objection, your Honor. That invades the province of the jury.

THE COURT: Sustained.

BY MR. BOGGS:

Q. Doctor, do you have an opinion as to the mental state of Mr. Sandstrom at the time that he took Mrs. Jessen's life?

A. Yes, I do.

Q. I would ask you to describe that to the jury as well as you can.

A. Okay. In my opinion that evening Mr. Sandstrom had been drinking with friends. He had some degree of alcohol in his system, which as I indicated would exasperate his basic traits, which I have also indicated.

In my opinion at the time of the murder he was really—it could be a correlation of factors. There are several factors. One is Mr. Sandstrom was somewhat limited in intelligence and that may have contributed to the fact that he perceived limited or fewer options than an average person. In addition he was intoxicated to some degree. Thirdly, he does have the basic personality characteristics that I have indicated of impulsiveness and impressions.

And I think in my opinion that when he was confronted with her presence and confronted with the screaming that his intention was at that point to silence Mrs. Jessen and when he was unable to do so with the shovel, pursued the course of events.

Q. Thank you, Doctor. Now, you are aware, are you not, of the facts stated in the confession and it's likewise been demonstrated here that Mrs. Jessen was sexually violated?

A. Yes.

Q. Were you able to determine from your examination of Mr. Sandstrom if he suffers sexual perversion, derangement in that regard?

A. In my opinion he—although he is certainly questionable—from the facts here of his past history he does not.

Q. You were able to discover none?

A. Well, Mr. Sandstrom was reluctant to discuss that aspect of the case about Mrs. Jessen, particularly, but he was less reluctant in terms of his background.

In my opinion as far as I know he has no past history of sexual abhorrent behavior.

Q. Well, do you have an opinion as to how that event—well, I will withdraw that.

MR. BOGGS: I don't have any other questions at this time, your Honor.

THE COURT: You may cross-examine for the State.

MR. CONNORS: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. CONNORS:

Q. Dr. Stratford, with regard to mental defect, that relates mainly to I.Q. of a person?

A. Yes.

Q. So, clearly David Sandstrom comes at least ten points above where you would draw the line for a person to be mentally defective?

A. That is true.

Q. How would you describe a mental disease?

A. In my opinion, from a medical point of view, mental disease is a psychosis, a psychosis either induced by some physiological problem that a person may have. I am referring to something like D.T. or psychosis which happens to people where they lose perspective and context with reality and they often have to be hospitalized suffering from hallucinations where they might hear voices or see things or be convinced that there is a conspiracy to destroy them, for example.

And these examples are within the province of mental disease from the medical point of view.

Q. Essentially a total falling out with reality?

A. Yes.

Q. Now, we have talked about characteristics, disorders or personality disorders or antisocial conduct, are all of these terms—are we talking about the same general area separate and apart from a psychosis?

A. Yes, we are. There is a continuum from the normal through the neurotic people, which generally have anxiety, to what is referred to as a personality or character disorder within this construction that Mr. Sandstrom falls, and it can be further defined within that as to what type of a personality disorder an individual does have. And it is my opinion that it is an antisocial or sociopathic personality disorder. Perhaps that explains it.

Q. And so it is clear an antisocial or personality disorder is not a mental disease?

A. That is true, it is not a psychosis, it is not a mental disease.

Q. Would Mr. Sandstrom be able to function in society, say in a common laborer's job, truck driving job, a job that would not require say a college education?

A. Given his personality or given his I.Q. or both.

Q. Well, start with the I.Q.

A. Given his I.Q. Mr. Sandstrom would be employable, and would be able to function within society.

Q. It may take longer to train him?

A. Right, he would not be as quick—he would not be as quick about picking up things, he would not have a tremendous capacity for abstract thought, but there are a lot of people functioning in society who have I.Q.'s which are similar to Mr. Sandstrom's.

Q. All right. How about his antisocial characteristics?

A. I separated that in my response to you and an antisocial person—in terms of the personality disorder is generally—has a very poor outlook, they are often running aloof of the law. They have a lot of difficulties with drugs and alcohol, they have a lot of difficulties with family maintenance, the maintenance—relationship with their children, maintaining employment. It is generally a very—is a particularly long-term picture.

Q. Now, Doctor, at the time you examined Mr. Sandstrom was he able to express to you the events of November 1, 1976, involving the homicide of Annie Jessen?

A. Yes, he was.

Q. Could he recall the facts and circumstances rather clearly?

A. Yes, he could.

Q. And you have read the complete confession of David Sandstrom?

A. Yes.

Q. In your opinion did he have the sufficient mental capacity at that time to be conscious of what he was doing?

A. At that time in my opinion he had the capacity to be aware of what he was doing.

Q. Was he aware of the facts and circumstances at that time?

A. I think he was aware of where he was, he was aware that Mrs. Jessen was screaming. I believe that he was aware of the fact that he hit her with the shovel. I believe that he was aware that he picked up a knife and I believe he was aware of the fact that he stabbed her with that knife.

Q. Therefore, would you say that he had the capacity to knowingly cause the death of Annie Jessen by stabbing her with the knife?

A. Yes, in my opinion he had the capacity to know that by stabbing her that there was a high probability he was going to cause serious injury to that woman.

Q. At the time of this crime did he have the capacity to purposely and consciously be aware of picking up the knife and actually inflicting the stab wounds to Annie Jessen?

A. In my opinion, yes. In my opinion he purposely hit her with the shovel first and he purposely picked up the knife and he purposely inflicted the stab wounds on Mrs. Jessen.

Q. Now, the terminology brought out in the questioning by defense counsel used the word deliberate and you distinguished between planning in advance, did you mean

before he went into the house that in your opinion he didn't have a plan to cause the death of Annie Jessen?

A. In my opinion that is true. Before he went in the house, in my opinion, it was not his intention or plan or deliberation to cause the death of Mrs. Jessen.

Q. And at what point in time or under what circumstances do you think in your opinion that he formed the purpose or had the knowledge to cause this act?

A. In my opinion it was at that point when he became aware that he was not alone in the house and he became aware by seeing Mrs. Jessen visually and he was aware of her screaming that at that point he purposely, in my opinion, began to inflict this series of events upon her.

MR. CONNORS: No further questions, your Honor.

THE COURT: Redirect?

MR. BOGGS: I would like redirect, your Honor.

REDIRECT EXAMINATION

BY MR. BOGGS:

Q. Doctor, in response to the question by Mr. Connors you stated that you believed that David Sandstrom had the capacity to purposely take the life of Mrs. Jessen, is that right?

A. I believe so.

Q. Do you have an opinion—I believe, however, is it not in fact true that you—it was your opinion that his purpose in striking her with the shovel and his purpose in stabbing her with the knife was to stop her from screaming?

A. Yes, sir.

Q. Do you think he formed the intent and purpose of taking her life?

A. In my opinion he did—he did not intend to kill her, but that he was aware of the fact—he had the capacity to be aware of the fact that the instruments that he utilized were capable of causing her death.

Q. Do you think he was aware of that fact and he was—he knew he was taking her life?

A. Do I believe that he was aware that he was taking her life in the sense he knew that is what he was doing?

Q. Yes.
A. In my opinion I believe that his intent was merely to silence her, I don't think he really considered it.
Q. Would it be fair to say that this was an act, an impulsive act?
MR. CONNORS: Objection, a leading question.
THE COURT: Overruled. It's repetitious but not necessarily leading.
THE WITNESS: Yes, in my opinion it was impulsive. As I have indicated, tried to indicate, I do not think it was his purpose to kill her. Given the combination of his I.Q., his personality, the alcohol, and the immediate circumstances, I think that it was an impulsive poorly planned act.
MR. BOGGS: I don't have any other questions, your Honor.
MR. CONNORS: Your Honor, may I ask another question?
THE COURT: That is a promise, one question.

RECROSS-EXAMINATION

BY MR. CONNORS:

Q. Doctor, in your opinion did David Sandstrom have the capacity to know that stabbing Annie Jessen in the back with the knife could cause her death?
A. Yes.
MR. CONNORS: Thank you.

(Whereupon witness was excused.)

THE COURT: Counsel, call your next witness.
MR. BOGGS: Dr. Michael Nash.

DR. MICHAEL NASH

was called as a witness, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BOGGS:

Q. Please state your name.
A. My name is Michael M. Nash.

Q. And what is your occupation?
A. I am a licensed clinical psychologist.
Q. That is what you are called, is that true?
A. Yes.
Q. Where do you reside?
A. I reside in Bozeman, Montana.
Q. What has been the experience and training that has lead to your being a clinical psychologist?
A. I received my P.H.D. in psychology at the University of Montana in 1971. I received my masters in psychology at the University of California, Riverside in 1965, and my law degree of—from the University of Montana in 1967. In 1971 after graduating I went to—I did my internship with the Department of Corrections in the State of Wisconsin and completed the requirements for clinical—to be a clinical psychologist.
I then went to Florida and taught on the faculty of Florida State University in the department of clinical psychology, obtained my license in psychology in Florida, then returned to Montana in 1973 where I was the chief in clinical services at the Montana State Prison for two years and also was licensed as a psychologist in the State of Montana and subsequently went into private practice and am now consulting with the State Prison on and during the period from 1970—well, throughout graduate school and throughout my training I have been particularly involved in the area of forensic psychology, that is the area of psychology that particularly relates to legal implications of various psychological cases.
Q. Mr. Nash, approximately how many cases concerning the mental elements of criminal offenses have you dealt with?
A. I have personally testified in about 20 criminal trials.
Q. And how many have you been involved in in a diagnosis or treatment capacity?
A. Hundreds, I really couldn't keep track.
Q. Mr. Nash, you were ordered by the Court to examine the Defendant David Sandstrom, were you not?
A. That is true.

Q. And you did examine him, I believe, isn't that true?

A. Yes.

Q. I would like to have you describe to the jury what your examination of Mr. Sandstrom revealed concerning his intelligence and his personality?

A. In January of 1977, I conducted a psychological interview with Mr. Sandstrom. I just took a couple of hours, interviewed his parents for some period of time and an hour to an hour and a half to administer some further psychological tests and further interviews and I provided a report and then I saw him again in May of this year, May 1st, to further explore some particular questions which were brought up in a preliminary hearing.

I administered the Wechsler Adult Intelligence Scale, the Minnesota Multiphasic Personality Inventory. I used pictures and asked him to tell me a story about those pictures. I had him do some figure drawings of a man and a woman. I gave him the Word Association Test.

As a result of these tests I found that he had a Verbal intelligence quotion of 79, which is a score that indicates that he is significantly in a statistical sense—he is measurably and statistically and significantly in a lower intelligence classification than the majority of people would be in, which is known clinically as a borderline—a level of borderline range of intelligence.

The MMPI, the Minnesota Multiphasic Personality Inventory resulted in a series of scales of scores. On the series of—well, 13 scales. Three of which have to do with whether or not it is a valid test, and they indicated in fact it was a valid test. Then you interpret the other scales in terms of the relationship of one scale to another, and in this particular—in this case the scales that were elevated are those which are often associated with individuals who have a lack of impulse control, suspiciousness, antisocial feelings or at least attitudes which deviate from the majority of attitudes of the culture, a lack of consistent internal principles. In other words, the behaviors we engage in which are antisocial or wrong do not even have any particular rational purpose internally.

In other words, it is not a clear-cut dedicated—for example, to a criminal life style it is impulsive criminal acting out and some possibility of an emotional disturbance.

Further, tests then were used and interpreted to determine the extent and whether or not there was a serious emotional disturbance and the additional tests tended to indicate while he was not that, he was not a very emotional person, that he in fact repressed feelings of guilt and—but he did not approach the extent of a psychotic or an insane dimension.

The tests in general—they reflected intellectual limitation, emotional immaturity, poor impulse control and confusion. They indicated a life style which is characterized by impulsive immediate gratification of impulses, little planning for thought, excessive drinking and states of rather constant intoxication and poor social relationships.

Q. Would it be correct to say that it was your opinion that David Sandstrom had little ability to analyze either the past or the future?

MR. RADONICH: To which we would object, it is leading.

THE COURT: Sustained.

BY MR. BOGGS:

Q. Now, the I.Q. you found of 79, that was the same I.Q. that Dr. Stratford found, isn't that right?

A. Dr. Stratford and I approached the determination of the level of intelligence in slightly a different fashion. He approached it in the sense of a range of abilities and a clinical comparison with other cases he has seen in the matter, which he has been trained in. My approach is to use a test that gives you a concrete score.

Both of us—in other words we independently ended up with the same classification which is borderline intelligence from different approaches.

Q. Now, would you characterize the elements of Mr. Sandstrom's personality as you found them to be a personality disorder?

A. That was my conclusion. My opinion is that he is suffering from a personality disorder, character disorder, or rather neurotic or psychotic conditions.

Q. Would it be your opinion that his personality disorder—or let me ask you this question. What would be the effect of alcohol consumption on the elements of that personality disorder?

A. Generally it would mean paying less attention to the realities of the environment around him and greater tendencies to act impulsively, act for the immediate value, what seems to be happening, to be less rational than he would be otherwise, exercising worse judgment.

Q. As a lawyer I assume you are familiar with the aspects of Montana Criminal Code that pertains to mental disease or defect, is that true?

A. Yes, I am.

Q. Do you have an opinion as to whether or not Mr. Sandstrom suffers from a mental disease or defect within the meaning of those provisions?

A. In my professional opinion as a psychologist he does not have a mental disease or defect which would make him unable to appreciate the consequences of his conduct or enable him to conform his conduct to the rule of law.

Q. Now, you are familiar with the facts that constituted the events of the death of Annie Jessen, is that true?

A. Yes, I am.

Q. You read the confession of David Sandstrom?

A. Yes, I did.

Q. In the course of your examination of Mr. Sandstrom was anything revealed to you that caused you to doubt any of the facts stated in the confession?

A. No.

Q. Well, I would ask you to assume those facts for the purposes of the following questions.

Do you have an opinion as to whether or not David Sandstrom deliberated on the death of Mrs. Jessen?

A. Yes.

Q. And what is that opinion?

A. In my opinion he did not anticipate or plan the death of Mrs. Jessen. He was in the reacting—at the time of the offense I believe his mental condition could best be described as a condition of—a range of frustration and anger and that he was trying to prevent her from screaming and that if that had occurred at some earlier stage he may not have gone any further, but that he took increasingly more severe steps to try to stop her from screaming and then that ultimately brought her to her death.

Q. I believe it was your answer you do not believe he deliberated on her death?

A. Yes.

Q. Would you say that this was well—let me ask you this. Do you believe that David Sandstrom on the early morning of November 1st of 1976 formed the specific intention to take Mrs. Jessen's life?

MR. RADONICH: To which we object, it calls for a conclusion, it invades the province of the jury and it is not an opinion.

THE COURT: Sustained.

MR. BOGGS: I don't have any other questions, your Honor.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. RADONICH:

Q. Mr. Nash, I believe you stated that you do not think David Sandstrom deliberated, do you mean that in the same context as Dr. Stratford when he said formed a plan?

A. I have an opinion he did not form a plan.

Q. Do you equate this with the deliberate thing that counsel speaks of?

A. I believe that was the context that was advanced.

Q. I believe you characterized his problem as a personality or character disorder. What do you mean?

A. A character disorder is a distinguished neurosis or psychotic condition generally which are thought of as

being processes of the mind that causes a neurosis or psychosis. It is the process of the mind that causes an internal distress or makes them unable to cope with reality. A character disorder is a learned way of approaching the world, it is a life style, as opposed to descriptions of internal processes.

Q. It's true, is it not, in various aspects of character disorders—most people have these?

A. Everybody has a character and when one aspect of that character causes the individual difficulties in coping with society we call that a character disorder.

In other words, everybody has this to some extent or another, a touch of greed or larceny or—but when that becomes a predominant operating factor you consider this individual a thief and that is a character disorder.

Q. I believe you indicated in one of the tests you had given to him that he had a lack of impulse control, a suspiciousness, antisocial feeling, those are elements that any ordinary person could have but he would not be out of reality, is that correct?

A. Yes.

Q. And a person could have all of those but still have them in control?

A. Yes, sir.

Q. How did you find Mr. Sandstrom when you examined him in January, was he cooperative to you to an extent?

A. I found him to be complying on the surface but somewhat leery of me and somewhat reticent. I had to drag information out of him. As the examination went along that became less difficult and when I saw him in May he was substantially easier to get information from but generally at the outset there was some difficulty in really establishing rapport.

Q. Was he at that time in touch with reality?

A. Yes.

Q. Did he appear to be alert to you?

A. Yes, at that time my notes reflected he appeared to be alert and oriented to the environment, although he appeared to have kind of a limited range of concern about the world. He was focusing principally right on

his immediate condition and that is—seems to be characteristic of his life style.

Q. He has the ability to decide what course of action —and capacity to decide one course of action from another, doesn't he?

A. Yes, he does.

Q. I believe you have stated in your report that he could decide not to take an alcoholic substance?

A. He can, he has the capacity to make those decisions.

Q. So that he could stop drinking or whatever, is that correct?

A. There is no mental illness that prevents him from doing so.

Q. All right. Just referring to alcohol in general, this is a depressant, is it not?

A. Yes.

Q. And it tends to depress the emotions and feelings of people?

A. It tends to inhibit judgment.

Q. Let me rephrase that, Mr. Nash. If a person has consumed a great deal of alcohol he would be so depressed that he may pass out?

A. Yes.

Q. As contrasted to a small amount that he may take, he may just weave when he walks?

A. Yes.

Q. So that depending upon the amount that he had it would dictate how he would act, would that be correct?

A. Yes.

Q. And if he had a small amount of alcohol he would not stagger when he walked?

A. Well, these are all just on a continuous—you could be sober or drunk or very drunk, but in—yeah.

Q. But these are physical characteristics that would show if the person was sober, partly drunk or really drunk?

A. Sure.

Q. And the physical characteristics being staggering, slurring of speech, loss of thought contents?

A. One of the first things that begins to deteriorate with increasing amount of alcohol is the disruption of

equilibrium, the ability to maintain balance and the more intoxicated you get the less feedback you get from the external environment, so that the—you don't hear quite what you are saying at the same time you are saying it and you get a slurness of speech, difficulty in maintaining the upright position without assistance and so on.

Q. And a person that is progressively drinking more is getting progressively deeper in a state of these types of things?

A. Yes.

Q. Now, in regard to your testing of Mr. Sandstrom, does he have the intelligence to function in society?

A. Yes, he does.

Q. He could be a truck driver or could be a—some type of activity that may require training but would not require—he could learn these things, could he not?

A. Generally with this intelligence he would be excluded, what would be considered skilled trades and I believe truck driving would be a skilled trade.

Q. Well, if he could drive a car he could probably be taught to drive a truck, a small normal delivery truck, as contrasted to across the country truck?

A. Not across the country.

Q. Could he at the same time have similar activities of digging ditches, working as a laborer, this type of thing?

A. Yes.

Q. And could he function as that?

A. Yes, from his intellectual perspective.

Q. I am referring only to the I.Q. Now, Doctor, I would like to refer you to this handbook which is a handbook of diagnostic and statistical manual of mental disorders put out by the American Psychiatric Association and ask you to refer to page 14 where it's contained that a borderline mental retardation is an I.Q. of between 68 and 83, is this how you arrived—when you determined the 79 I.Q., is this how you arrived at a borderline mental retardation?

A. Basically, yes.

Q. Insofar as the I.Q. is concerned?

A. Yeah.

Q. Would it be fair to say then that if he had an I.Q. of 83 or above he would then be a normal person?

A. Well, he would be in a range that—in that case what we'd call normal.

Q. If it was a lower I.Q. than would be normal that would be categorized as having a personality or character disorder?

A. The term we are dealing with here with mental defect—any time we have an I.Q. of less than 83 we have an area of mental defect, above 83 even though there is a separate statistical category it is not considered a mental defect, in this case it is.

Q. Let me ask you this then, is it true that the average mean I.Q. is 100?

A. The mean I.Q. is 100.

Q. And presumably half the people are above that and half the people are below that?

A. That's right.

Q. The people then between the 83 and 100—well, the 83—excuse me. The 100, down below to zero, that would be half the people, is that correct?

A. From 100 to zero it would be half the people.

Q. Now, the people between 83 and 100 would be considered, so far as mental defect is, considered normal?

A. Yes.

Q. And then above the 100 they would be considered, I suppose, brilliant?

A. Well, above 100 and 115 they would be considered measurably—as measurably more intelligent as somebody with the less—85 I.Q. is measurably less capable. 85 percent of the total fall between the range of 85 and 115.

Q. Referring, Mr. Nash, to when David Sandstrom was in the home of Annie Jessen's residence on November 1st, what is your opinion as to whether or not he had the capacity to purposely pick up the knife?

A. In my opinion, he had the capacity to do that, to know that he was picking up the knife, to intend to pick up the knife.

Q. And did he have the capacity to know when he picked up the shovel that hitting Mrs. Jessen would harm her?

A. Yes.

Q. When he began stabbing Mrs. Jessen, did he have the capacity to know that stabbing her could result in her death?

A. I believe he had the basic capacity to do so.

Q. To know that this would be the result?

A. Yes.

MR. RADONICH: I have no further questions.

MR. BOGGS: May I reopen my direct examination, there is an area I neglected.

THE COURT: Very well.

FURTHER DIRECT EXAMINATION

BY MR. BOGGS:

Q. Mr. Nash, you recall do you not that in the confession it stated that Mr. Sandstrom sexually violated Mrs. Jessen, do you recall that?

A. Yes, I do.

Q. In your examination of Mr. Sandstrom were you able to uncover evidence of sexual perversion or disorder or anything of that kind?

A. No—

MR. RADONICH: To which we object, this has nothing to do with the sexual end, your Honor, outside the province of the case.

THE COURT: Overruled.

THE WITNESS: No, not in the sense of perversion, no.

BY MR. BOGGS:

Q. Do you have an opinion as to the mental state of David Sandstrom while he committed this act?

A. Yes, I do.

Q. What is that opinion?

MR. RADONICH: To which I object, that is outside the scope of this case, what his mental condition was after the homicide.

THE COURT: Sustained.

MR. BOGGS: Very well. May I have one question in rebuttal?

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. BOGGS:

Q. Dr. Nash, in response to a cross-examination question you believe David Sandstrom had the capacity to comprehend or know what he was doing—stabbing Mrs. Jessen and as a result taking her life. Do you have an opinion as to whether he had that knowledge in the sense of a present awareness that that is what he was doing?

A. Yes, I do.

Q. And what is your opinion?

A. In my opinion at the time the killing took place he was in a—had a condition which is described as a rage, meaning that he was less conscious of awareness of the activities that were going on. This is partly a result of his intelligence, partly a result of the fact that he had some alcohol, partly the result of the fact that he had tendencies of repressive feelings of guilt than when they are provoked to, flooding out, his anger projection and at that time that the act was going on he had a less appreciation for the logical consequences of the behavior that he was engaging in, that he would have ordinarily.

But, this did not approach a psychotic condition so therefore he had the capacity to appreciate it.

If he would have been in a psychotic condition he would have little memory of the events, but in fact he does remember them. So, psychologically the capacity was there but the likelihood or the nature of that appreciation has been somewhat reduced.

MR. BOGGS: No other questions.

MR. RADONICH: We have no further questions.

THE COURT: Thank you, Doctor, you may step down.

THE COLIQUY BETWEEN THE COURT AND PETITIONER'S ATTORNEY WITH RESPECT TO THE INSTRUCTION HERE AT ISSUE. [Official Transcript pages 332 line 12 through 333 line 6].

THE COURT: The Court proposes to give Instruction No. 5, offered by the State as No. 3.

MR. BOGGS: Your Honor, I object to that instruction. I can cite to your Honor a number of cases, I believe they are all in the Federal Court or—I believe in the Federal Court, one in the 9th Circuit Court of Appeals that have disproved the use of this instruction. The holding has been that the instruction has the effect of shifting the burden of proof on the issue of intent to the defense and that is inpermissible under the Federal Constitution, due process of law. Stating from the case of Mullaney vs. Wilbur the United States Supreme Court case, the 5th Circuit has categorically denounced and the 9th Circuit—and it was an error in a particular case in which it came out—it was not reversible but nonetheless it was an error to use the instruction.

My intern can give you those citations if you would like to see them.

THE COURT: You can give those to the Supreme Court. The objection is overruled.

INSTRUCTIONS GIVEN BY JUDGE BOYD

INSTRUCTION NO. 3

The defendant, David Sandstrom, is by information charged with the crime of deliberate homicide, a felony, in that on or about November 1, 1976, in Deer Lodge County, Montana, he purposely or knowingly caused the death of Annie Jessen by stabbing the said Annie Jessen in the back with a knife.

Before you may convict the defendant, David Sandstrom of the crime of deliberate homicide, a felony, you must be convinced beyond a reasonable doubt of the following elements of this crime:

1) That the defendant did cause the death of Annie Jessen on November 1, 1976, in Deer Lodge County, Montana; and,

2) That the defendant caused the death of Annie Jessen purposely or knowingly.

INSTRUCTION NO. 4

You are instructed that the law presumes a person innocent until he is proved guilty, and this proof must be of a nature to satisfy your minds beyond a reasonable doubt of the guilt of the accused. The mere fact that an information has been filed, charging a person with a crime, does not, in itself, raise a presumption of guilt.

The presumption of innocence has the weight and effect of evidence in the Defendant's behalf, and this should continue until it is rebutted by competent evidence which displaces any reasonable doubt you might otherwise have of the Defendant's guilt.

INSTRUCTION NO. 5

The law presumes that a person intends the ordinary consequences of his voluntary acts.

INSTRUCTION NO. 6

A Material element of every crime is a voluntary act, which includes an omission to perform a duty which the law imposes on the offender and which he is physically capable of performing.

INSTRUCTION NO. 7

"Knowingly" is defined as follows: A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstances exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a

high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.

INSTRUCTION NO. 8

"Purposely" is defined as follows: A person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result.

INSTRUCTION NO. 9

Purpose and knowledge are manifested by the circumstances connected with the offense. Purposes and knowledge need not be proved by direct evidence, but may be inferred from acts, conduct and circumstances appearing in evidence.

INSTRUCTION NO. 10

A person who is in an intoxicated condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. An intoxicated condition may be taken into consideration in determining the existence of a mental state which is an element of the offense.

INSTRUCTION NO. 11

"Mitigated deliberate homicide" is defined as follows: Criminal homicide constitutes mitigated deliberate homicide when a homicide which would otherwise be deliberate homicide is committed under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a reasonable person in the actor's situation.

INSTRUCTION NO. 12

You are instructed that the defendant, David Sandstrom, has abandoned the defense of mental disease or

defect and you may not acquit the defendant on that basis.

INSTRUCTION NO. 13

If you are convinced beyond a reasonable doubt that the defendant, David Sandstrom, caused the death of Annie Jessen on November 1, 1976, in Deer Lodge County, Montana, but you are not convinced beyond a reasonable doubt that the defendant caused the death of Annie Jessen purposely or knowingly, then you should find the defendant guilty of mitigated deliberate homicide.

INSTRUCTION NO. 14

If you are not convinced beyond a reasonable doubt that the defendant, David Sandstrom, caused the death of Annie Jessen on November 1, 1976, in Deer Lodge County, Montana, purposely or knowingly, then you should find the defendant not guilty of deliberate homicide.

INSTRUCTION NO. 15

You are to draw no conclusions or inferences from the fact that the defendant has not testified in this case, and you are entitled to draw no conclusions or inferences as to his reason in that regard.

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT OF THE
STATE OF MONTANA
IN AND FOR THE COUNTY OF DEER LODGE

Cause No. 2877

STATE OF MONTANA, PLAINTIFF

—vs.—

DAVID SANDSTROM, DEFENDANT

VERDICT—Filed July 25, 1977

Deliberate Homicide

We, the jury in the above entitled action find the defendant DAVID SANDSTROM, guilty of the crime of deliberate homicide.

Dated this 21 day of July, 1977.

/s/ Robert L. Buhl
Foreman

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT OF THE
STATE OF MONTANA
IN AND FOR THE COUNTY OF DEER LODGE

No. 2877

STATE OF MONTANA, PLAINTIFF

—vs.—

DAVID SANDSTROM, DEFENDANT

JUDGMENT—Filed July 25, 1977

After written waiver of preliminary hearing by the defendant, David Sandstrom, and Order of Justice of the Peace John Sajcich binding the defendant over to District Court for trial, a criminal Information was filed on December 2, 1976, by the County Attorney for Deer Lodge County as attorney for the State of Montana, charging the defendant with the following FELONY: Deliberate Homicide, in violation of Section 94-5-102, R.C.M. 1947, as amended, committed on or about November 1, 1976.

The Defendant was arraigned on December 2, 1976, and advised of the nature of the charges against him, of the maximum sentence after a plea or verdict of guilty, of his right to a jury trial, and of his right to counsel, either retained by the defendant or appointed by the court if the defendant was indigent.

The defendant was thereafter represented by Public Defender Byron Boggs and entered a plea of "Not Guilty" to the above criminal charge.

A trial by jury was held on July 18, 1977, and the jury returned the following verdict:

"IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF DEER LODGE

No. 2877

STATE OF MONTANA, PLAINTIFF

—vs.—

DAVID SANDSTROM, DEFENDANT

VERDICT

We, the jury in the above entitled action, find the defendant, DAVID SANDSTROM, guilty of the crime of Deliberate Homicide.

Dated this 21st day of July, 1977.

/s/ Robert L. Buhl
Foreman"

The defendant appeared in open court on July 25, 1977, and was asked if he had any legal cause to show why sentence and judgment of the court should not be imposed at that time, and the defendant replied in the negative;

NOW, THEREFORE, it is the sentence and judgment of the court as follows:

(1) The defendant shall be imprisoned in the State Prison at Deer Lodge, Montana, for a period of one hundred (100) years; that said sentence shall be served consecutively with the sentence and Judgments ordered in Deer Lodge County causes numbered 2878 and 2885 respectfully.

The defendant is hereby remanded to the custody of the Sheriff of Deer Lodge County, for transportation to the State Prison for execution of this the sentence and judgment of the court.

Dated this 25th day of July, 1977.

/s/ Robert J. Boyd
District Judge

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT OF THE
STATE OF MONTANA
IN AND FOR THE COUNTY OF DEER LODGE

July 26, A.D. 1977

Present, Hon. ROBERT J. BOYD

STATE OF MONTANA

against

DAVID SANDSTROM

Convicted of DELIBERATE HOMICIDE

JOSEPH CONNORS

The County Attorney, with the Defendant—and counsel, BYRON BOGGS came into Court. The Defendant was duly informed by the Court of the nature of the indictment found against him for the crime of DELIBERATE HOMICIDE committed on the 1st day of Nov. A.D. 1977, and of arraignment and plea on the 3rd day of DECEMBER, A.D. 1976, of "Not Guilty of ———— as charged in the indictment." The Defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him to which he replied that he had none. And no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment: That whereas the said DAVID SANDSTROM having been duly convicted in the Court of the crime of DELIBERATE HOMICIDE

It is Therefore, Ordered, Adjudged and Decreed, That the said DAVID SANDSTROM be punished by imprisonment in the Penitentiary of the State of Montana, for the term of 100 years at hard labor, and that a civil judgment be entered against the said DAVID SANDSTROM for the costs of this prosecution.

The defendant was then remanded to the custody of the Sheriff of the said County of DEER LODGE to be by him delivered into the custody of the proper officers of said Penitentiary.

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT OF THE
STATE OF MONTANA
IN AND FOR THE COUNTY OF DEER LODGE

The State of Montana, To the Sheriff of the County of DEER LODGE, State of Montana, and the Warden and Officers in charge of the Penitentiary of the

State of Montana—GREETING:

Whereas, DAVID SANDSTROM, having been duly convicted in our District Court of the THIRD Judicial District of the State of Montana, in and for the County of DEER LODGE of the crime of DELIBERATE HOMICIDE and judgment having been pronounced against him that he be punished by imprisonment in the Penitentiary of the State of Montana, for the term of 100 years consecutively all of which appearing to us of record, and a certified copy of the judgment being endorsed herein and made a part hereof:

Now, This is to Command You, the Sheriff of the County of DEER LODGE to take and keep and safely deliver the said DAVID SANDSTROM into the custody of the said Warden, or other Officer in charge of the said Penitentiary, at your earliest convenience.

And This is to Command You, the said Warden and other officers in charge of the Penitentiary of the State of Montana, aforesaid, to receive of and from the Sheriff of the County of DEER LODGE the said DAVID SANDSTROM convicted and sentenced as aforesaid, and HE the said DAVID SANDSTROM keep and imprison in the said Penitentiary for the State of Montana, for the term of 100 years.

And these presents shall be your authority for the same. Herein fail not.

Witness: Hon. ROBERT J. BOYD, Judge of the said District Court, at the Court House in ANACONDA in

the County of DEER LODGE this 26th day of July, A.D. 1977.

Attest:

My hand and the seal of said Court, the day and year last above written.

/s/ Helen Meloy
Clerk

/s/ By Angela Kieser
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF MONTANA

1978

No. 14064

STATE OF MONTANA, PLAINTIFF AND RESPONDENT

—*vs.*—

DAVID SANDSTROM, DEFENDANT AND APPELLANT

Appeal from: District Court of the Third Judicial District, Honorable Robert J. Boyd, Judge presiding.

Counsel of Record:

For Appellant:

Byron Boggs argued, Anaconda, Montana

For Respondent:

Hon. Mike Greely, Attorney General, Helena, Montana
John Radonich argued, County Attorney, Anaconda, Montana

Submitted: May 3, 1978

Decided: June 8, 1978

Mr. Justice John Conway Harrison delivered the Opinion of the Court.

On November 1, 1976, Mrs. Annie Jessen, 89 years of age, was found dead in her home in Anaconda, Montana, the apparent victim of a brutal assault in which

she received blows to her head from a shovel, and five stab wounds to her back from a kitchen knife. Mrs. Jessen had, in addition, been sexually assaulted and received a compound fracture to her leg, apparently after the slaying.

On November 22, 1976, defendant, 18 years of age, was arrested for an unrelated crime. Shortly thereafter, and while in custody of the Deer Lodge County sheriff, defendant confessed to the slaying of Mrs. Jessen. The confession was subsequently corroborated by certain physical evidence.

Based upon the confession and supporting evidence, defendant was charged, by an Information filed December 2, 1976, with the crime of deliberate homicide, in violation of section 94-5-102, R.C.M. 1947.

At the arraignment on the charge, defendant entered a plea of "not guilty" and filed a notice of intent to rely on mental disease or defect excluding criminal responsibility, as a defense.

Defense counsel subsequently moved for a change of venue, based upon allegedly prejudicial pretrial publicity. The motion was heard on July 6, 1977 in the District Court, Deer Lodge County. Defendant presented the testimony of four witnesses. Three of the four witnesses testified that, despite their perception that many Anaconda areas residents had formed some opinion concerning the case, the defendant could receive a fair trial in Deer Lodge County. The fourth witness, Oscar Sandstrom, the father of defendant, testified primarily concerning abusive phone calls he had received following his son's arrest. The motion was denied with leave to renew at the time of jury selection.

The trial on the charge commenced on July 18, 1977. Defendant's renewed motion for change of venue was denied. Defendant further moved that the jurors be examined in voir dire individually and in segregation, which motion was also denied. Following voir dire, defendant again renewed his motion for change of venue. The motion was again denied.

In his opening statement, defense counsel informed the jury that defendant no longer intended to rely on

the defense of mental disease or defect. The decision to so inform the jury appears to have been based on the reports of two psychiatrists who had examined defendant and determined he was able to appreciate the consequences of his actions, despite his low intelligence level and aggressive/impulsive personality.

The case-in-chief for the state consisted of defendant's confession, together with the corroborating physical and circumstantial evidence. Defendant called as witnesses the two psychiatrists who had examined defendant prior to trial. The witnesses testified that, while defendant may not have had the specific intent to kill at the time of the offense, it was their opinion that he had the intent to "silence" Mrs. Jessen, and was conscious of his activity in bringing about the result.

Following the reception of evidence and upon their deliberations, the jury returned a verdict convicting defendant of the crime as charged. Defendant was subsequently sentenced to 100 years imprisonment in the Montana State Prison.

Defendant appeals the judgment of conviction, entered upon the verdict of the jury.

Defendant raises two issues for review: (1) Did the District Court abuse its discretion in denying defendant's motions for change of venue? and (2) Did the District Court err in giving court's instruction No. 5?

Defendant first argues that the District court abused its discretion in denying his three motions for change of venue on the grounds an impartial trial could not be afforded defendant in Deer Lodge County. It is maintained the pretrial publicity, given the nature of the crime in this case, rendered selection of an impartial jury impossible.

The applicable statute in this regard, section 95-1710 (a), R.C.M. 1947, states:

> "The defendant * * * may move for a change of place of trial on the grounds that there exists in the county in which the charge is pending such prejudice that a fair trial cannot be had in such county."

Accordingly, it is well settled that granting a change of venue in a criminal trial is within the sound discretion of the trial court, and the denial of a motion for change of venue will only be reversed upon a showing of an abuse of discretion. State ex rel. Hanrahan v. District Court, (1965), 145 Mont. 501, 401 P.2d 770; State v. Corliss, (1967), 150 Mont. 40, 430 P.2d, 632; State v. Olson, (1971), 156 Mont. 339, 480 P.2d 822.

It has been held that mere publication of a news story dealing with the facts and circumstances of the crime is not a sufficient basis for change of venue. Published accounts of crimes are not considered prejudicial unless so passionate as to excite undue prejudice, rendering it impossible to empanel a trial jury free from prejudice against the defendant. State ex rel. Hanrahan v. District Court, supra; State v. Corliss, supra.

Defendant relies on Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1938), and State v. Dryman, (1954), 127 Mont. 579, 269 P.2d 796, as authority for reversing a conviction in which change of venue had been denied, despite adverse pretrial publicity. The cases, however, are clearly distinguishable on the basis of the volume and content of the publicity.

Here, the publicity under consideration consists of 17 newspaper articles concerning various aspects of the crime, the investigation, and the subsequent arrest of defendant. Two of the articles, published after defendant's arrest, contain a picture of defendant in police custody.

Considering the nature of the crime involved, we find the reporting extremely objective and factual. Further, we do not consider the amount of publicity given to the crime and ensuing events in this case to be unreasonably voluminous. We conclude that there was no abuse of discretion in the District Court's refusal to grant defendant's motion for change of venue.

It is significant to note that the witnesses at the hearing on defendant's initial motion for change of venue, with the sole exception of defendant's father, testified they believed defendant would receive a fair trial in Deer

Lodge County, despite the pretrial publicity and existence of some measure of adverse public opinion.

Further, while certain of the twelve empaneled jurors had read or heard something regarding the crime, there exists no requirement that jurors be totally ignorant of the facts involved in the case before them. It is sufficient if the juror can lay aside any impressions or opinions and render a verdict based upon the evidence presented at the trial. State v. Moran, (1963), 142 Mont. 423, 384 P.2d 777; State v. Simpson, (1939), 109 Mont. 198, 95 P.2d 761.

Defendant next contends the District Court erred in giving court's instruction No. 5 to the jury. Instruction No. 5 states:

> "The law presumes that a person intends the ordinary consequences of his voluntary acts."

The given instruction paraphrases the language of section 93-1301-7(3), R.C.M. 1947, giving rise to the rebuttal presumption.

Defendant, in essence, contends the given instruction shifts to a defendant the burden of disproving an element of the crime charged, i.e. intent. It is maintained the state is thus relieved from proving an essential element of the crime charged, contrary to recent pronouncements of the United States Supreme Court. In re Winship, (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L Ed 2d 368; Mullaney v. Wilbur, (1975), 421 U.S. 684, 95 S.Ct. 1881, 44 L Ed 2d 508; Patterson v. New York, (1977), 432 U.S. 197, 97 S.Ct. 2319, 53 L Ed 2d 281.

The recent decisions relied on by defendant generally prohibit, under the auspices of the due process clause, shifting to a defendant, such as by presumption, the burden of proof regarding an essential element of the offense, most typically the element of criminal intent. In re Winship, supra; Mullaney v. Wilbur, supra; Patterson v. New York, supra. However, such cases do not prohibit allocation of *some* burden of proof to a defendant under certain circumstances. Rather, the concern expressed in such cases is that the State prove every element of the offense charged as that offense is defined

by state law. State v. McKenzie, (No. 13011, Decided June 7, 1978).

Moreover, an instruction similar in effect to that under consideration here has received recent consideration and approval by this Court in State v. Coleman, —— Mont. ——, —— P.2d ——, 35 St.Rep. 560. In fact, the very instruction was approved by this Court in State v. McKenzie, supra, by the following language:

> "The presumptions that an unlawful act was done with unlawful intent, and that a person intends the ordinary consequences of his voluntary act, have been a part of Montana law since 1895. This Court has previously approved the use of these presumptions in criminal cases on the issue of intent. State v. Caryl, (1975), 168 Mont. 414, 426, 543 P.2d 389; State v. McLeod, (1957), 131 Mont. 478, 489, 311 P.2d 400, 407. See also State v. Jones, (1963), 143 Mont. 155, 181, 387 P.2d 913. The conclusions drawn through the use of these presumptions are generally fair and reasonable ways to ascertain intent which, of course, can never be proved directly * * *." —— St.Rep. ——.

A review of the transcript of the trial in this case demonstrates that the State satisfied its burden of proof of each of the elements of the offense charged, including the element of intent. Defendant's sole burden under instruction No. 5 was to produce some evidence that he did not intend the ordinary consequences of his voluntary acts, not to disprove that he acted "purposely" or "knowingly". We hold the instruction does not violate due process standards as defined by the United States or Montana Constitution, and as interpreted by relevant case authority, and therefore does not constitute reversible error.

The conviction of defendant is affirmed.

/s/ John Conway Harrison
Justice

We concur:

/s/ Frank I. Haswell
Chief Justice

/s/ Gene B. Daly

/s/ Daniel J. Shea

/s/ John C. Shuhey
Justices

IN THE SUPREME COURT OF THE
STATE OF MONTANA

14064

D.C. #2877

March Term A.D. 1978

The Chief Justice of the Supreme Court of the State of Montana:

To the Honorable Judge of the District Court of the Third Judicial District, in and for the County of Deer Lodge, Greeting:

WHEREAS, In the said District Court in a cause between State of Montana Plaintiff and Respondent and David Sandstrom Defendant and Appellant wherein the Judgment of the said District Court, entered in said cause on the 11th day of August A.D. 1977 was in favor of the said Plaintiff and Respondent and against the said Defendant and Appellant as by the inspection of the transcript of the record of said Court in said cause which was brought into the Supreme Court of said State by virtue of an appeal, agreeably to the statue of said State and the rules of said Supreme Court in such case made and provided, fully and at large appears.

AND WHEREAS, in the March term of court in the year of our Lord, one thousand nine hundred and seventy-eight said cause came on to be heard before said Supreme Court and was argued by counsel.

WHEREAS, On consideration, it is now here ordered and adjudged by this Court that the Judgment of the Court below, entered in this cause on the 11th day of August A.D. 1977 is affirmed.

Costs in this Court:

Appellant	Appearance	— $ none
Respondent	Appearance	— $ none
Remittitur	.....	— $ none

June 8 A.D. 1978

You, THEREFORE, are hereby commanded that such further proceedings be had in said cause as, according to right and justice, and the laws of the State of Montana ought to be had, not inconsistent with the opinion hereto attached.

WITNESS: The Honorable Frank I. Haswell Chief Justice of the Supreme Court of the State of Montana, this 29th day of June A.D. 1978.

/s/ Richard T. Conboy
Deputy Clerk of the
Supreme Court of the
State of Montana

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. 14064

STATE OF MONTANA, PLAINTIFF AND RESPONDENT

vs.

DAVID SANDSTROM, DEFENDANT AND APPELLANT

ORDER

PER CURIAM:

Appellant's petition for rehearing in the above named cause having been filed, and the same considered by this Court,

IT IS HEREBY ORDERED that the petition for rehearing in the above named cause is denied.

DATED this 28th day of June, 1978

/s/ Frank I. Haswell
Chief Justice

/s/ Gene B. Daly

/s/ John Conway Harrison

/s/ John C. Shuhey
Justices

SUPREME COURT OF THE UNITED STATES

No. 78-5384

DAVID SANDSTROM, PETITIONER

v.

MONTANA

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Montana.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 8, 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 296662 324

RECEIVED
OCT 10 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QC

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

ORIGINAL COPY

No. 78-558

DAVID SANDSTROM,

Petitioner,

vs.

STATE OF MONTANA

Respondent.

FOR R SP

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF MONTANA

MIKE GREELY
Attorney General
State of Montana
Capitol Building
Helena, Montana 59601

DENNY MOREEN
Assistant Attorney General
State of Montana
Capitol Building
Helena, Montana 59601

JOHN RADONICH
Deer Lodge County Attorney
Deer Lodge County Courthouse
Anaconda, Montana 59711

Attorneys for Respondent

BYRON W. BOGGS
212 East Park Avenue
Anaconda, Montana 59711

Attorney for Petitioner

10

TABLE OF CONTENTS

	Pages
Argument:	
I. Mullaney and Patterson have not been violated	1
II. The Federal Circuit Court Cases are inapposite	5
Conclusion	6

CASES CITED

Cohen v. United States, 378 F.2d 751 (9th Cir. 1967)	4,5
Menn v. United States, 319 F.2d 404 (5th Cir. 1963)	4,5
Mullaney v. Wilbur, 421 U.S. 684 (1975)	1,2
Patterson v. New York, 432 U.S. 197 (1977)	1,2
Rhay v. Browder, 342 F.2d 345, 349 (9th Cir. 1965)	2
State v. Klein, 169 Mont. 350, 356, 547 P.2d 75 (1976)	3,4
State v. Sharbono, ___ Mont. ___, 563 P.2d 61, 72-73 (1977)	3,4
United States v. Bertolotti, 529 F.2d 149 (2nd Cir. 1975)	5
United States v. Chiantese, 560 F.2d 1244 (5th Cir. 1977)	5
United States v. Garrett, 574 F.2d 778 (3rd Cir. 1978)	5

OTHER AUTHORITIES

Commission Comment, Mont. Crim. Code 1973, Ann., p.73	3,4

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No._____

DAVID SANDSTROM,

Petitioner,

vs.

STATE OF MONTANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

ARGUMENT

I. MULLANEY AND PATTERSON HAVE NOT BEEN VIOLATED

Petitioner alleges that the rulings of Mullaney v. Wilbur, 421 U.S. 684(1975), and Patterson v. New York, 432 U.S. 197(1977) have been violated in that the trial court relieved the state of its requirement to prove all elements of the crime charged . That is not the case before you. The error alleged is that the trial court gave the jury an instruction to the effect that the law presumes that a person intends the ordinary consequences of his voluntary acts.

Mullaney and Patterson are mandates by this Court

that the state in a criminal prosecution must prove each and every element of the crime charged as that crime is defined by state law. However, once having established, the existence of each and every element the state can require the defendant to prove an affirmative defense by a preponderence of the evidence. Patterson at 206. Rhay v. Browder, 342 F.2d 345, 349(9th Cir.1965).

In Mullaney malice aforethought was the element which distinguished the crime of murder from the crime of manslaughter. However, the element of malice was presumed to exist once the state proved that an unlawful homicide had taken place. The presumption relieved the state of any requirement to prove the intent element of the crime. A far cry from the evidentiary presumption challenged in this case.

This Court in Patterson upheld the New York requirement that a defendant must establish, by a preponderence of the evidence, the affirmative defense of extreme emotional disturbance. In other words, the state having proved intent, the defendant was required to establish extreme emotional disturbance by a preponderence of the evidence.

These mandates have not been violated by the trial court.

Under Montana law a person commits deliberate homicide if he purposely or knowingly causes the death of another human being.[1] In 1973 the criminal law of Montana was rewritten. One of the express purposes of the new Criminal Code was to do away with what is commonly known as "specific intent". Commission comment, Mont. Crim. Code 1973, Ann., p.73.; State v. Klein, 169 Mont. 350, 356, 547 P.2d 75(1976), State v. Sharbono, _____Mont. _____, 563 P.2d 61, 72-73(1977). In the present case what is required is that the defendant purposely or knowingly caused the death of another human being. Sections 94-5-101(1) and 94-5-102(1), R.C.M. 1947. A person acts purposely if it is his conscious object to engage in the conduct or cause the result.[2] A person acts knowingly when he is aware of his conduct.[3]

In other words in Montana there is no requirement

---

1 Section 94-5-101(1), R.C.M. 1947, states:
A person commits the offense of criminal homicide if he purposely, knowingly or negligently causes the death of another human being.

Section 94-5-102, R.C.M. 1947, states in part:
Deliberate homicide.(1) Except as provided in 94-5-103(1)(a), criminal homicide constitutes deliberate homicide if:
(a) it is committed purposely or knowingly; or

2 Section 94-2-101(52), R.C.M. 1947, defines purposely:
"purposely" - a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. ...

that a defendant specifically intend the demise of his victim. The intent element in the crime of deliberate homicide is that the State prove a "general intent" that the defendant intended to engage in certain conduct.

> " A major problem of prior Montana criminal law was the use in the code of numerous terms affecting culpability that were largely undefined. Under the new Code, the mental states required for various degrees of culpability are defined carefully in a heirarchy. "Purposely" is the most culpable mental state and implies a design. This term replaces the term frequently used in the old code, "intentionally". It should be noted that a person need not act toward a particular result; he need act only with the object to engage in a certain conduct. "

Commission Comment, Mont. Crim. Code 1973, Ann. p.73.; State v. Klein, Supra; State v. Sharbono , Supra.

Under Montana Law the state is not required to prove that the defendant intended the consequences of his act. Having shown that the defendant engaged in the acts that resulted in the victim's death on purpose it does not matter under Montana Law whether or not he engaged in them with the intent to cause the demise of the victim. Therefore, the presumption has no effect under Montana Law. The question is not whether the defendant intended the consequences rather the question

[3] Section 94-2-101(27), R.C.M. 1947, defines knowingly: "knowingly" - a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that a circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is, aware that it is highly probable that such result will be caused by his conduct. ...

is did he intend the act.[4]

II. THE FEDERAL CIRCUIT COURT CASES ARE INAPPOSITE.

Petitioner states that three Federal Circuit Courts have struck the instruction used by the trial court in this case.

United States v. Chiantese, 560 F.2d 1244(5th Cir.1977), United States v. Garrett, 574 F.2d 778(3rd Cir.1978) and Cohen v. United States, 378 F.2d 751(9th Cir.1967) involved a similar instruction with an additional clause that a person intends the acts "unless the contrary appears." The so called "Mann instruction." Mann v. United States, 319 F.2d 404(5th Cir.1963). The added clause was what the courts found to be inappropriate. Reading the instructions as a whole no prejudice was found and none of these convictions were reversed.

United States v. Bertolotti, 529 F.2d 149(2nd Cir.1975), found the given instruction erroneous because of the strict requirements as to proof of intent in conspiracy trials.

None of the cases cited by petitioner are applicable to the case at hand.

[4] In fact, the effect of the instruction may have been to intimate to the jury that the state was required to prove a "specific intent"; exactly the requirement the New Criminal Code did away with.

CONCLUSION

There being no "specific intent" required for a conviction of deliberate homicide in Montana the instruction cannot be considered in error whether or not it shifts any burden to the defendant as to a "specific intent." This case does not question any holding of Mullaney or Patterson. Respondents, therefore, respectfully request that the Petition be denied.

Respectfully submitted,

JOHN RADONICH
Deer Lodge County Attorney
Deer Lodge County Courthouse
Anaconda, Montana 59711

MIKE GREELY
Attorney General
State of Montana
Helena, Montana 59601

DENNY MOREEN
Assistant Attorney General
State of Montana
Helena, Montana 59601

DATED: 5 October 1978

Supreme Court, U. S.
FILED
FEB 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5384

DAVID SANDSTROM,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

BRIEF FOR PETITIONER

BYRON W. BOGGS
212 East Park Avenue
Anaconda, Montana 59711
Court-appointed Counsel for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED	2
QUESTION PRESENTED	5
STATEMENT OF THE CASE	6
HOW FEDERAL QUESTION WAS RAISED BELOW	8
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. TO PURPOSELY OR KNOWINGLY CAUSE A DEATH IS AN ELEMENT OF THE OFFENSE CHARGED AGAINST PETITIONER AND OF WHICH PETITIONER WAS CONVICTED	11
II. THE QUESTION AS TO WHETHER PETITIONER PURPOSELY OR KNOWINGLY CAUSED THE DEATH WAS PROPERLY RAISED BY THE TRIAL EVIDENCE AND PRESENTED A QUESTION FOR JURY DETERMINATION UPON PROOF BEYOND A REASONABLE DOUBT	14
III. THE JURY INSTRUCTION, "THE LAW PRESUMES THAT A PERSON INTENDS THE ORDINARY CONSEQUENCES OF HIS VOLUNTARY ACTS," SHIFTED THE BURDEN OF PROOF ON THE ELEMENT OF PURPOSELY OR KNOWINGLY CAUSING THE DEATH TO PETITIONER AND	

THEREBY DENIED HIM HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW 17

CONCLUSION AND PRAYER FOR RELIEF 23

TABLE OF AUTHORITIES

Cases *Page*

Block v. United States,
221 F.2d 786 (9th Cir. 1955) 21

Chappell v. United States,
270 F.2d 274 (9th Cir. 1959) 21

In Re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d
368 (1970) 10,17,23

Mann v. United States,
319 F.2d 404 (5th Cir., 1963) cert. den.
375 U.S. 986, 84 S.Ct. 520, 11 L.Ed.2d
474 (1964) 20

Monahan v. Standard Motor Company,
96 Mont. 165, 29 P.2d 278 (1934) 19

Morrissette v. United States,
342 U.S. 246, 72 S.Ct. 240, 96 L.Ed.288
(1952) 10,22,23

Mullaney v. Wilbur,
421 U.S. 684, 44 L.Ed.2d 508, 95
S.Ct. 1881 (1975) 10,22,23

Patterson v. New York,
432 U.S. 197, 53 L.Ed.2d 281, 97
S.Ct. 2319 (1977) 10,13,22,23

State v. Collins,
___ Mont. ___, 582 P.2d 1179, 35 St.Rptr.
993, 999 (1978) 9,12

State v. Garney,
122 Mont. 491, 207 P.2d 506 (1949) 20

State v. Judd,
20 Mont. 420 20

State v. Klein,
___ Mont. ___, 547 P.2d 75, 33
St.Rptr. 283 (1976) 9,12

State v. McKenzie,
___ Mont. ___, 581 P.2d 1205, 35
St.Rptr. 759 (1978) 9,13

State v. Schafer,
35 Mont. 217, 88 Pac. 792 (1920) 20

State v. Sharbono,
___ Mont. ___, 563 P.2d 61, 34 St.Rptr.
196, (1977) 9,12

United States v. Barash,
365 F.2d 395 (2d Cir. 1966) 21

United States v. Bertolotti,
529 F.2d 149, (2d Cir. 1975) 21

United States v. Chiantese,
560 F.2d 1244 (5th Cir. 1977) 21

United States v. Garrett,
574 F.2d 778, (3rd Cir. 1978) cert. den.
___ U.S. ___, ___ S.Ct.56 L.Ed.2d
67 (1978) 21

Statutes

Revised Codes of Montana

94-5-101 2,3
94-5-102(a) 2,3,9,11,12,3
94-2-101(27) 2,3,11
94-2-101(52) 2,3,11
93-1301-1 2,4,10
93-1301-2 2,4,10
93-1301-3 2,4,10,18
93-1301-4 2,4,10
93-1301-5 2,4,10
93-1301-7(3) 2,5,10,18

Rules

Montana Rules of Evidence

301(a) 5,18
301(b)(2) 5,19

Other Authorities

Webster's New Collegiate Dictionary
(1977 ed.) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5384

DAVID SANDSTROM,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

BRIEF FOR PETITIONER

OPINIONS BELOW

The Supreme Court of Montana has issued an opinion in this case, a copy of which appears in the Appendix, page 45. The opinion is officailly reported at 35 St.Rptr. 744, 580 P.2d 106. The Judgment of the Supreme Court of Montana is printed in the Appendix, page 52. An order denying rehearing is also included in the Appendix, page 54. The Journal Entry of the Judgment of the Supreme Court of Montana, is printed in the Appendix, page 2.

JURISDICTION

The Judgment of the Supreme Court of Montana was entered on June 29, 1978 [Appendix, page 52]. The timely petition for rehearing was denied on June 28, 1978 [Appendix, page 54]. The jurisdiction of the Supreme Court is invoked pursuant to this Court's ability to review and decide any title, right, privilege or immunity specially set up or claimed under the Constitution of the United States. 28 U.S.C. §1257(3). Petition for Writ of Certiorari to the Montana Supreme Court was filed September 12, 1978; Certiorari granted January 8, 1978.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added)

This case also involves Sections 94-5-101, 94-5-102(a), 94-2-101(27) and (52), 93-1301-1, 93-1301-2, 93-1301-3, 93-1301-4, 93-1301-5, and 93-1301-7(3), of the Revised

Codes of the State of Montana, which provide as follows:

Section 94-5-101. CRIMINAL HOMICIDE.

> "(1) A person commits the offense of criminal homicide if he purposely, knowingly or negligently causes the death of another human being.
>
> (2) Criminal homicide is deliberate homicide, mitigated deliberate homicide, or negligent homicide."

Section 94-5-102(a). DELIBERATE HOMICIDE.

> "(1) Except as provided in 94-5-103(1)(a) criminal homicide constitutes deliberate homicide if:
>
> (a) it is committed purposely or knowingly; . . ."

Section 94-2-101(27)

> ""Knowingly"—a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning."

Section 94-2-101(52)

> ""Purposely"—a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although

such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as "purpose" and "with the purpose" have the same meaning."

Section 93-1301-1. INDIRECT EVIDENCE CLASSIFIED.

"Indirect evidence is of two kinds:

1. Inferences; and,
2. Presumptions."

Section 93-1301-2. INFERENCE DEFINED.

"An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of the law to that effect."

Section 93-1301-3. PRESUMPTION DEFINED.

"A presumption is a deduction which the law expressly directs to be made from particular facts."

Section 93-1301-4. WHEN AN INFERENCE ARISES.

"An inference must be founded:

1. On a fact legally proved; and,
2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature . . . "

Section 93-1301-5. PRESUMPTIONS MAY BE CONTROVERTED, WHEN.

"A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted, the jury are bound to find according to the presumption."

Section 93-1301-7(3). ALL OTHER PRESUMPTIONS MAY BE CONTROVERTED.

"All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions; and may be controverted by other evidence. The following are of that kind:

(3) That a person intends the ordinary consequences of his voluntary act."

And the Rules 301(a) and 301(b)(2) of the Montana Rules of Evidence:

Rule 301. PRESUMPTIONS IN GENERAL.

"(a) Presumption defined. A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action or proceeding.

(b) CLASSIFICATION AND EFFECT OF PRESUMPTIONS

(2) All presumptions, other than conclusive presumptions, are disputable presumptions and may be controverted. A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption."

QUESTION PRESENTED

Did the Jury Instruction, "The law presumes that a person intends the ordinary consequences of his voluntary acts.," given at Petitioner's trial on the charge of Deliberate Homicide committed purposely or knowingly deprive him of his Fourteenth Amendment right to

a jury determination as to every element of the crime charged against him upon proof of guilt beyond a reasonable doubt?

STATEMENT OF THE CASE

On November 1, 1976, Mrs. Annie Jessen, eighty-nine years of age and a life-long resident of Anaconda, Montana, was found dead in her home. She was the victim of an assault involving a blow to her head by a shovel and five stab wounds in her back from a kitchen knife. Mrs. Jessen had also been sexually assaulted, apparently after her death.

On or about November 22, 1976, Petitioner, David Sandstrom, eighteen years of age, and also of Anaconda, was arrested with regard to an unrelated burglary. Shortly thereafter, while in custody of the Deer Lodge County Sheriff, Petitioner confessed to causing the death of Mrs. Jessen. This confession was later collaborated by various circumstantial facts; notably, the identification of a pubic hair found on Mrs. Jessen as being probably that of Petitioner's; and by Petitioner leading Deer Lodge County law enforcement officers to Warm Springs Creek in Anaconda where he had thrown the knife. Based upon the confession and collaborating evidence, Petitioner was charged on December 2, 1976, with Deliberate Homicide in that he, "purposely or knowingly caused the death of Annie Jessen." [Information, Appendix page 3].

At his arraignment on this charge, Petitioner entered a plea of not guilty and simultaneously filed a notice of intent to rely on a mental disease or defect excluding

responsibility for the alleged crime. [Appendix page 4]. Pursuant to such notice, Petitioner was examined by two court-appointed mental health experts, Dr. William Stratford, a psychiatrist practicing in Missoula, Montana, and Dr. Michael Nash, a clinical psychologist practicing in Bozeman, Montana. The independently prepared reports of both doctors were in agreement as to their evaluation of Petitioner's mental condition at the time of the death of Mrs. Jessen. Both men found that Petitioner did not suffer from a mental disease or defect which under the Montana Criminal Code would relieve him of responsibility for his acts. Both men did find, however, that Petitioner, a person of borderline retarded intelligence, suffered from a personality disorder marked by impulsiveness, aggressiveness, and a lack of planning. Additionally, the doctors stated that the characteristics of Petitioner's personality disorder, impulsiveness and aggressiveness, would be aggravated to a serious degree by alcohol consumption. [Appendix pp. 12-15, 22-26]. On the night the Petitioner caused the death of Mrs. Jessen, evidence shows that he had consumed between three and four six-packs of beer and some whiskey. [Appendix p. 9-10]. The doctors formed the opinion, after considering the combination of Petitioner's personality, the evidence of intoxication, and the circumstances surrounding the fatal acts as stated in Petitioner's confession, that Petitioner did not intend the death of Mrs. Jessen. [Appendix pp. 16, 17, 21, 22, 26, 27, 33]. Based on the expert opinions of Drs. Stratford and Nash, Petitioner's attorney informed the jury in his opening remarks that he no longer intended to rely on a mental disease or defect excluding responsibility, but rather, intended to contest the allegation that Petitioner

acted purposely or knowingly in taking Mrs. Jessen's life. [Appendix pp. 6-8].

Petitioner's trial commenced July 18, 1977. The Prosecution case consisted of the confession together with collaborating evidence. The defense case consisted of the testimony of Drs. Stratford and Nash which was to the effect that the Petitioner did not have either "purpose" or "knowledge", required by Montana law as an element of the offense of Deliberate Homicide, in causing Mrs. Jessen's death. The jury found the Petitioner guilty of Deliberate Homicide and he was sentenced to one hundred years confinement in the Montana State Prison. [Appendix pp. 38, 39, 42].

HOW THE FEDERAL QUESTION WAS RAISED BELOW

Following presentation of all the evidence, the Court included in its instructions to the jury the instruction, "The law presumes that a person intends the ordinary consequences of his voluntary acts." [Appendix p. 35]. This instruction, requested by the Prosecution, was objected to by Petitioner's attorney as violating the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States by shifting the burden of proof to the Petitioner on the issue of intent. The trial Court, however, overruled the objection. [Appendix p. 34].

The verdict and judgment of the Trial Court was timely appealed to the Supreme Court of Montana. A principle question raised in that appeal concerned the Constitutionality of Jury Instruction No. 5. [Appendix p. 49-51]. The Supreme Court of Montana affirmed the Trial Court's verdict and judgment in a decision dated

June 8, 1978. In that decision, the Court stated that the instruction was not violative of due process standards. [Appendix pp. 49-51].

A timely petition for rehearing, again questioning the Constitutionality of Jury Instruction No. 5, was denied June 28, 1978. [Appendix p. 54].

On September 12, 1978, the Petition for Writ of Certiorari was filed in this Court. On January 8, 1979, the Writ of Certiorari to the Supreme Court of Montana was granted [Appendix p. 55].

SUMMARY OF ARGUMENT

Petitioner was charged and convicted of Deliberate Homicide committed purposely or knowingly under Section 94-5-102(a) of the Montana Criminal Code. From the plain language of this statute and from the interpretations given it by the Montana Supreme Court, it is clear beyond question that to purposely or knowingly cause a death is an element of this crime and that these terms embody the concepts of *mens rea* and criminal intent. *State v. Collins,* ___Mont.___, 582 P.2d 1179, 1184, 35 St.Rptr. 993, 999 (1978); *State v. Klein,* ___Mont.___, 547 P.2d 75, 78, 33 St.Rptr. 283, 288 (1976); *State v. Sharbono,* ___Mont.___, 563 P.2d 61, 72, 34 St.Rptr. 196, 211 (1977). *State v. McKenzie,* ___Mont.___, 581 P.2d 1205, 1232, 35 St.Rptr. 759, 794 (1978).

The trial evidence consisted of Petitioner's confession, collaborating evidence and the testimony of two court-appointed mental health experts, a psychiatrist and a psychologist. The opinions of the mental health experts were that Petitioner neither purposely or knowingly

caused the death in undertaking the fatal acts as described in the confession. A question thus being raised as to an element of the crime charged against Petitioner he was entitled to a jury determination as to this element upon proof of guilt beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).

Upon request of the Prosecution and over Defense objection, the jury was instructed that, "The law presumes a person intends the ordinary consequences of his voluntary acts." The common meaning of this instruction is that the jury should accept the fact that Petitioner intended to cause the death without proof. Under Montana law the instruction placed upon Petitioner the burden of proving that he did not intend the death by a preponderance of the evidence. Sections 93-1301 et.seq. quoted *supra.*, p. 4, 5 and Rule 301, Montana Rules of Evidence, quoted *supra.*, p. 5. Petitioner argues that this shifting of the burden of proof to him on the element of intent deprived him of his right to due process of law under the Fourteenth Amendment to the United States Constitution. Upon appeal, the Montana Supreme Court affirmed the use of this presumption against Petitioner in direct contradiction of this Court's holdings in *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975); *Morrissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952); and, *Patterson v. New York*, 432 U.S. 197, 53 L.Ed.2d 281, 97 S.Ct. 2319 (1977).

ARGUMENT

I. TO PURPOSELY OR KNOWINGLY CAUSE A DEATH IS AN ELEMENT OF THE OFFENSE CHARGED AGAINST PETITIONER AND OF WHICH PETITIONER WAS CONVICTED.

Petitioner was charged under Section 94-5-102(1)(a) Montana Criminal Code, Deliberate Homicide Committed Purposely or Knowingly, [Appendix p. 3]. This Section (quoted *supra.*, p. 3) is part of the Montana Criminal Code enacted in 1973. It represents an abandonment of the old terms defining first degree murder: "premeditation" and "malice aforethought." These terms are replaced by the terms "purposely" or "knowingly," which are defined in Sections 94-2-101, (27) and (52) of the Montana Criminal Code. These definitions were given to the jury in Petitioner's trial by Instructions Nos. 7 and 8:

INSTRUCTION NO. 7:

> ""Knowingly" is defined as follows: A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstances exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning." [Appendix pp. 35, 6].

INSTRUCTION NO. 8:

> ""Purposely" is defined as follows: A person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result." [Appendix p. 36]

Section 94-5-102(1)(a) Montana Criminal Code is on its face perfectly clear that purposely or knowingly causing a death is an element of this crime. Beyond this, the Montana Supreme Court has stated unambiguously that purposely or knowingly causing a death is an element of deliberate homicide charged under this section and that these terms embody the *mens rea* or criminal intent element of this crime:

> "It is to be noted from the definitions that committing the homicide 'purposely or knowingly' is an element of deliberate homicide, . . ."

State v. Collins, ___Mont.___, 582 P.2d 1179, 1184, 35 St.Rptr. 993, 999 (1978).

> "It is clear that the legislature intended the words "purposely" and "knowingly" would substitute for the word feloniously (i.e. intentionally) as used in the old code. . . ."

State v. Klein, ___Mont.___, 547 P.2d 75, 78, 33 St.Rptr. 283, 288 (1976).

> "The necessary requirements for "*Mens Rea*" and "*Criminal Intent*" are embodied in the use of the new language of the statute "purposely" and "knowingly"."

State v. Sharbono, ___Mont.___, 563 P.2d 61, 72, 34 St.Rptr. 196, 211 (1977).

> "In Montana, a person commits the offense of deliberate homicide if he purposely or knowingly causes the death of another human being. Sections 94-5-102(1)(a), 94-5-101(1), R.C.M. 1947. The statutorily defined elements of the offense, each of which the State must prove beyond a reasonable doubt, are therefore, causing the death of another human being with the knowledge that you are causing or with the purpose to cause the death of that human being."

State v. McKenzie, ___Mont.___, 581 P.2d 1205, 1232, 35 St.Rptr. 759, 794 (1978).

McKenzie was decided by the Montana Supreme Court on remand from this Court for further consideration in light of *Patterson v. New York*, 432 U.S. 197, 53 L.Ed.2d 281, 97 S.Ct. 2319 (1977); and was cited as precedent for the holding in Petitioner's appeal [Appendix p. 50]. Because purposely or knowingly causing a death is held in *McKenzie* to be an element of Deliberate Homicide, *McKenzie* does not bring Petitioner's case under the holding of *Patterson* that state legislatures may designate some factual matters which are not elements of offenses as affirmative defenses.

The jury in Petitioner's trial was instructed without objection that an element of deliberate homicide was that the Defendant caused the death of the victim purposely or knowingly, Instruction No. 3 [Appendix p. 34, 5]. The Verdict and Judgment was: Guilty of the charge Deliberate Homicide [Appendix p. 38]. From all the foregoing, the fact that purposely or knowingly causing the death was an element of the crime charged against the Petitioner and of which he was convicted is clear beyond question.

II. THE QUESTION AS TO WHETHER PETITIONER PURPOSELY OR KNOWINGLY CAUSED THE DEATH WAS PROPERLY RAISED BY THE TRIAL EVIDENCE AND PRESENTED A QUESTION FOR JURY DETERMINATION UPON PROOF BEYOND A REASONABLE DOUBT.

In his opening remarks, Petitioner's attorney informed the jury that he intended to contest the allegation that Petitioner had caused the death purposely or knowingly. [Appendix pp. 6-8]. The evidence presented by the State at Petitioner's trial consisted of Petitioner's confession, [Appendix pp. 9-11] together with evidence tending to show the validity of the confession. The evidence presented by the defense consisted of the testimony of two Court-appointed mental health experts, Dr. William Stratford, Psychiatrist practicing in Missoula, Montana, and Dr. Michael Nash, Psychologist, practicing in Bozeman, Montana. Both men were well versed in the forensic aspects of psychiatry or psychology, Dr. Stratford being a consulting psychiatrist with the Montana State Prison [Appendix p. 13], and, Dr. Nash being past chief of clinical services at the Montana State Prison and continuing as a consultant there [Appendix p. 23]. Each of these doctors had examined Petitioner and were acquainted with the facts stated in the confession. Assuming those facts to be true and based upon their examination and the circumstances of the case both men stated the opinion that the defendant did not intend to kill Mrs. Jessen. Specifically, Dr. Stratford to the question,

> "Do you think he formed the intent and purpose of taking her life?"

Answered,

> "In my opinion—he did not intend to kill her. . . ." [Appendix p. 21].

In answer to the question,

> "Do you think he was aware of that fact and he was—he knew he was taking her life?"

Dr. Stratford stated,

> "In my opinion I believe that his intent was merely to silence her I don't think he really considered it." [Appendix pp. 21, 22].

And in response to the question,

> "Would it be fair to say that this was an act, an impulsive act?"

Dr. Stratford answered,

> "Yes, in my opinion it was impulsive. As I have tried to indicate, I do not think it was his purpose to kill her. . . ."[Appendix p. 22].

Dr. Nash, in response to the question,

> "Do you have an opinion as to whether or not David Sandstrom deliberated on the death of Mrs. Jessen?"

Answered,

> "In my opinion he did not anticipate or plan the death of Mrs. Jessen." [Appendix pp. 26, 27].

And, to the question,

> "Dr. Nash in response to the cross examination question do you believe David Sandstrom had the capacity to comprehend or know what he was doing—stabbing Mrs. Jessen and as a result taking

her life. Do you have an opinion as to whether he had that knowledge in the sense of a present awareness that that is what he was doing?"

Answered,

"In my opinion at the time the killing took place he was in a—had a condition which is described as a rage, meaning that he was less conscious of awareness of the activities that were going on. This is partly a result of his intelligence, partly a result of the fact that he had some alcohol, partly the result of the fact that he had tendencies of repressive feelings of guilt that when they are provoked to, flooding out, his anger projection and at that time that the act was going on he had a less appreciation for the logical consequences of the behavior that he was engaging in than he would have ordinarily. But, this did not approach a psychotic condition so therefore he had the capacity to appreciate it. If he would have been in a psychotic condition he would have had little memory of the events but, in fact, he does remember them so psychologically the capacity was there but the likelihood or the nature of that appreciation have been somewhat reduced." [Appendix p. 33].

The opinions of both these experts were based upon their findings that Petitioner suffered from a borderline retarded intelligence and a personality disorder marked by impulsiveness and a lack of planning which would be aggravated to a significant degree by the amount of alcohol that he had consumed on the night of the fatal acts. [Appendix pp. 13-15, 24-26]. Both experts had formed the opinion that Petitioner's specific intent in undertaking the acts which caused the death of Mrs. Jessen was to stop her from screaming and that he did not have in mind causing her death. [Appendix pp. 16, 17, 27]. No attempt was made to rebut this expert testimony by the State.

Clearly the testimony of Drs. Stratford and Nash raised a question as to an element of the crime with which Petitioner was charged; that is, "Did Petitioner act purposely or knowingly in causing the death?" Such question being raised, Petitioner had the constitutional right to a jury determination of this factual question upon proof of guilt beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368, (1970).

III. THE JURY INSTRUCTION, "THE LAW PRESUMES THAT A PERSON INTENDS THE ORDINARY CONSEQUENCES OF HIS VOLUNTARY ACTS," SHIFTED THE BURDEN OF PROOF OF THE ELEMENT OF PURPOSELY OR KNOWINGLY CAUSING THE DEATH TO PETITIONER AND THEREBY DENIED HIM HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

At the time of settlement of Jury Instructions, Petitioner's attorney objected to Proposed Instruction No. 5: "The law presumes that a person intends the ordinary consequences of his voluntary acts.", upon the grounds that this instruction shifted the burden of proof on the element of intent to the defense in violation of Due Process Clause of the Fourteenth Amendment. This objection was overruled by the trial Court and the Instruction was given. [Appendix p. 34]. No instructions were given to the jury defining the classification, nature or effects of presumptions in criminal proceedings.

Under the common meaning of the word "presume," the instruction directed the jury to believe the fact presumed without proof. Webster's New Collegiate Dictionary (1977 ed.), "Presume," def. No. 3 p. 911. The word, "intent," means "purpose." Webster's New Collegiate Dictionary (1977 ed.): "Intent," def. No. 1 (a) p. 601. In other words, Jury Instruction No. 5 misled the jury to take for granted that the Petitioner had the requisite intent or purpose to kill if his act was proven as causing Mrs. Jessen's death. The effect of Jury Instruction No. 5 was to direct the jury to accept, without question, the existence of purpose in Petitioner's act. This deprived Petitioner of his due process right to have a jury determination as to every element of the charge against him upon proof of guilt beyond a reasonable doubt.

Even if it is assumed for argument that the jury understood the meaning of the word, "presume," as that term is used in Montana law, the Petitioner would still be deprived of his right to have a jury determination of the proof of every element of the charge against him beyond a reasonable doubt. A presumption under Montana law is, "[A] deduction which the law expressly directs to be made from particular facts." Sec. 93-1301-3 R.C.M. 1947; quoted *supra.* p. 4; or as otherwise stated, "[A]n assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action or proceeding." Montana Rules of Evidence Rule 301(a). The particular presumption here at issue is statutorily stated to be a disputable presumption. Section 93-1301-7(3) R.C.M. 1947, quoted *supra.*, p. 5. With respect to disputable presumptions,

Rule 301(b)(2) of the Montana Rules of Evidence states:

> "All presumptions, other than conclusive presumptions, are disputable presumptions and may be controverted. A disputable presumption may be overcome by a preponderance of the evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption."

This rule codifies earlier Montana case law. *Monahan v. Standard Motor Company*, 96 Mont. 165, 173-74, 29 P.2d 278 (1934). See also, Sec. 93-1301-5 R.C.M. 1947, quoted *supra.*, p. 4. It is clear from these authorities that under Montana law Instruction No. 5 shifted the burden of proof on the element of purpose or knowledge, *i.e.*, intent, to the Petitioner to prove by a preponderance of the evidence that he did not intend to kill.

The statement made by the Montana Supreme Court in its opinion on Petitioner's appeal that,

> "Defendant's sole burden under Instruction No. 5 was to produce some evidence that he did not intend the ordinary consequences of his voluntary acts not to disprove that he acted purposely or knowingly.," [Appendix p. 50].

is without foundation in statute or rule, and ignores the plain meaning of this instruction. Further, this statement is not meaningful in terms of the facts of the case: As characterized by the Court itself, the testimony of Drs. Stratford and Nash was that Defendant may not have had the specific intent to kill at the time of the offense [Appendix p. 47]. This was certainly "some evidence," that Petitioner did not intend the ordinary consequences of his voluntary acts. If this was Petitioner's sole burden under the presumption, he would have met it and there

would be no reason to state the presumption to the jury. Further, no instruction was given to the jury explaining to them that Instruction No. 5 required only the production of "some evidence." The opinion of the Montana Supreme Court ignores the clear effect of Instruction No. 5 on the jury both under its common meaning and its meaning under Montana law.

At least four Federal Circuit Courts of Appeal have disapproved instructions embodying the concept expressed in Instruction No. 5. The history of this instruction in the Fifth Circuit can be traced to *Mann v. United States*, 319 F.2d 404 (5th Cir., 1963) *cert. denied*, 375 U.S. 986, 84 S.Ct. 520, 11 L.Ed.2d 474 (1964) (Although, the *Mann* holding certainly does not represent the first time this question was dealt with. In fact, The Montana Supreme Court, itself, as early as 1898, found an instruction of similar effect to be reversible error, *State v. Judd*, 20 Mont. 420; see also, *State v. Schafer*, 35 Mont. 217, 88 Pac. 792 (1920); and, *State v. Garney*, 122 Mont. 491, 207 P.2d 506 (1949).) In the *Mann* case the Fifth Circuit Court of Appeals disapproved of an instruction which shifted the burden of proof on the element of intent to the Defendant, stating,

> "If an inference ... must be overcome with opposing evidence, then the inference becomes a presumption and places a burden on the accused to overcome that presumption." p. 1246

Since *Mann*, cases too numerous to cite challenging the instruction have been brought in the Fifth Circuit. For economy reference may be made to the concise history of these cases as presented by Judge Clark, writing for the

Circuit sitting en banc, in *United States v. Chiantese*, 560 F.2d 1244, 1245-1255 (1977). This state of affairs caused the Fifth Circuit, to direct that:

> "No district Court in this Circuit shall include in its charge to the jury an instruction on proof of intent which in couched in language which could reasonably be interpreted as shifting the burden to the accused to produce proof of innocence." *United States v. Chiantese*, supra., p. 1255.

Similarly, the Third Circuit recently banned the use of this type of Instruction in *United States v. Garrett*, 574 F.2d 778, (3rd Cir. 1978) Cert. denied ___ U.S. ___, ___ S.Ct. 56 L.Ed.2d 67 (1978); wherein the Court stated,

> "Hereafter District Courts in this Circuit shall not use language in instructions that reasonably can be interpreted as shifting the burden to the accused to produce proof of innocence. This includes charges indicating that the law presumes a person to intend the natural and probable consequences of his knowing acts, as well as charges substantially similar to that given in this case." p. 782

The Second Circuit strongly disapproved the instruction in *United States v. Bertolotti*, 529 F.2d 149, 159 (2nd Cir. 1975.) and *United States v. Barash*, 365 F.2d 395 (2d Cir. 1966). The Ninth Circuit, has also disapproved of intent-presumption instructions. See, *Block v. United States*, 221 F.2d 786, 788-89 (9th Cir. 1955); and, *Chappell v. United States*, 270 F.2d 274, 279, 280 (9th Cir. 1959).

The rationale of all these Federal Circuit Courts of Appeal cases clearly shows that rather than requiring Petitioner to merely produce some evidence that he did

not intend to kill, Instruction No. 5, at the least, shifted to him the burden of proving by a preponderance of the evidence that he did not purposely or knowingly cause a death and more probably allowed the jury to assume intent to kill without proof.

This Court has held that the Due Process Clause requires of the States that in criminal prosecutions they prove every ingredient of an offense beyond a reasonable doubt and that they may not shift the burden of proof to the Defendant by presuming that ingredient upon proof of other elements of the offense. *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975); *Morrissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), and *Patterson v. New York*, 432 U.S. 197, 53 L.Ed.2d 281, 295, 97 S.Ct. 2319 (1977). Instruction No. 5 instructed the jury in Petitioner's trial to presume the element of purposely or knowingly causing the death, *i.e.* intent to kill, which was the very crux of the case, from the element of causing the death; this instruction thereby deprived Petitioner of his right to due process of law under the Fourteenth Amendment to the United States Constitution.

CONCLUSION AND PRAYER FOR RELIEF

Petitioner was charged and convicted of Deliberate Homicide committed purposely or knowingly. The element of this crime, that Petitioner purposely or knowingly caused a death was contested by the defense and presented a question for jury determination. Due process of law requires that every element of the crime charged be proved beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 368 (1970). Petitioner's jury was, however, instructed that, "The law presumes a person intends the ordinary consequences of his voluntary acts." This instruction shifted the burden of proof to Petitioner as to the intent element of the crime charged in violation of this Court's holdings in *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975) and *Patterson v. New York*, 432 U.S. 197, 53 L.Ed.2d 281, 97 S.Ct. 2319 (1977).

The question presented by this case is the same as that presented in *Morrissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952) wherein Justice Jackson analyzed the case as being presented on the theory that even if criminal intent were essential its presence should be decided by the Court as a presumption of law, apparently conclusive. And wherein, the Court held that where intent of the accused is an ingredient of the crime charged its existence is a question of fact which must be submitted to the jury, and that the Trial Court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act.

To maintain the integrity of the right to trial by jury, it is essential that the jury and not the Court make the determination as to what inferences are reasonable to be drawn from the particular facts of the case, as those facts can be determined from the evidence, and what inferences shall not be drawn. The proper role of the Court is but to instruct the jury on the standard of proof applicable.

Surely the time has come to put and end to the use of an instruction which deprives defendants of their Constitutional right to due process of the law with regard to a right so essential to criminal justice as the standard of proof of guilt beyond a reasonable doubt. And, that this instruction be ruled finally and conclusively to be reversible error no longer acceptable in the Courts of the Nation.

WHEREFORE, Petitioner prays that his conviction of the crime, Deliberate Homicide committed purposely or knowingly, be reversed.

Respectfully submitted,

/s/ Byron W. Boggs
Byron W. Boggs
212 East Park Avenue
Anaconda, Montana 59711

Court-appointed Attorney for Petitioner

FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 26 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-5384

DAVID SANDSTROM,
Petitioner,

vs.

STATE OF MONTANA,
Respondent.

BRIEF OF RESPONDENT

MICHAEL T. GREELY
Attorney General
State of Montana
State Capitol
Helena, Montana 59601

MIKE McCARTER
Assistant Attorney General

DENNY MOREEN
Assistant Attorney General

JOHN RADONICH
Deer Lodge County Attorney
Anaconda, Montana 59711

Attorneys for Respondent

BYRON W. BOGGS
212 East Park Avenue
Anaconda, Montana 59711
Attorney for Petitioner

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

Pages

Question Presented 1

Statutes Involved 1

Summary of the Argument 3

Argument:

I. The petition should be dismissed because the defendant admitted all of the elements of the crime charged: error, if any, in giving an instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" was harmless beyond a reasonable doubt. 4

II. The instruction that the law presumes that a person intends the ordinary consequences of his voluntary acts did not relieve the state of its burden of proving all elements of deliberate homicide beyond a reasonable doubt. 13

A. The presumption as used in the case below placed a burden of production on the petitioner. 16

B. The presumption in this case comports with the due process standards under *Barnes v. United States.* 18

C. The instructions as a whole required the state to prove all elements beyond a reasonable doubt. 21

Conclusion 22

CASES CITED

Pages

Agnew v. United States, 165 U. S. 36, 50 (1897) 15

Barnes v. United States, 412 U. S. 837 (1973) 3, 19, 20, 21, 22

Bishop v. People, 165 Colo. 423, 439 P. 2d 342 (1968) ... 18

Bollenbach v. United States, 326 U. S. 607, 614 (1946) 16

Brown v. United States, 411 U. S. 223, 231 (1973) 12

Chapman v. California, 386 U. S. 18, 24, rehearing denied, 386 U. S. 987 (1967) 12

Cramer v. United States, 325 U. S. 1, 31 (1944) 15

Cullin v. State, 565 P. 2d 445 (Wyo., 1977) 18

Cupp v. Naughten, 414 U. S. 141, 146 (1973) 21

Hall v. State, 49 Ala. 381, 272 So. 2d 590 (1973) 17

Harrington v. California, 395 U. S. 250, 254 (1969) 12

In re Winship, 397 U. S. 358 (1970) 16, 19, 20

McCarthy v. Bruner, 323 U. S. 673 (1944) 13

Mullaney v. Wilbur, 421 U. S. 684 (1975) ... 16, 19, 20, 21, 22

Needelman v. United States, 362 U. S. 600 (1960) 13

Patterson v. New York, 432 U. S. 197 (1977) 16, 19, 20

Patterson v. State, 239 Ga. 409, 238 S. E. 2d 2 (1977) 18, 19

Radio Officers v. Labor Board, 347 U. S. 17, 45 (1953) 15

Reynolds v. United States, 98 U. S. 244 (1878) 15

Schneble v. Florida, 405 U. S. 427, 430 (1972) 12

CASES CITED—Continued

Pages

State v. McKenzie, 581 P. 2d 1205, 1232 (Mont. 1978) 3, 7

State v. Preis, 89 Ariz. 336, 362 P. 2d 660 (1961) 18

State v. Roberts, 88 Wash. 2d 337, 562 P. 1259 (1977) 17

State v. Sandstrom, — Mont. —, 580 P. 2d 106 (1978) 3

State v. Vandiver, 584 P. 2d 978 (Wash., 1978) 18

State v. Warbritton, 211 Kan. 506, 506 P. 2d 1152 (1973) 18

Turner v. United States, 396 U. S. 489, 406 (1970) 18

United States v. Gainey, 380 U. S. 63 (1965) 19

STATUTES CITED

Section 94-5-101 (1), R. C. M. 1947 5

Section 94-2-101 (27), R. C. M. 1947 ..... 3, 6

Section 94-5-102, R. C. M. 1947 ..... 3, 4, 6

Section 94-5-105 (2), R. C. M. 1947 ..... 1, 3

Montana Criminal Code 1973, Annot. at 73 5

Montana Criminal Code 1973, Annot. at 115 5

TEXTS CITED

1 *Greenleaf On Evidence,* 16th Ed., § 13, p. 113 (1899) 13

Thayer, *A Preliminary Treatise on Evidence,* p. 326 (1898) 14

1 *Jones On Evidence,* § 130, p. 211 (2nd Ed., 1926) 15

TEXTS CITED—Continued

Pages

Vol. 2, Stephen, *History of Criminal Law of England,* p. 111 (1883) 14, 15

Clark and Marshall, *Crimes,* p. 243, § 5.03 (6th Ed. 1958) 14

RULE CITED

Rule 301 (b) (2), The Montana Rules of Evidence 16

In The

Supreme Court of the United States

October Term, 1978

—o—

No. 78-5384

—o—

DAVID SANDSTROM,

Petitioner,

vs.

STATE OF MONTANA,

Respondent.

—o—

BRIEF OF RESPONDENT

—o—

QUESTION PRESENTED

The question presented, as set forth in petitioner's brief, raises the following subsidiary issue:

> Did petitioner's admission of the requisite criminal mental state at trial render the error, if any, harmless?

—o—

STATUTES INVOLVED

In addition to those statutes set forth in the petitioner's brief, this case involves section 94-2-105 (2), R. C. M. 1947, which provides:

> *Causal relationship between conduct and result.*
>
> (1) Conduct is the cause of a result if:

(a) without the conduct the result would not have occurred; and

(b) any additional causal requirements imposed by the specific statute defining the offense are satisfied.

(2) If purposely or knowingly causing a result is an element of an offense, and the result is not within the contemplation or purpose of the offender, either element can nevertheless be established if:

(a) the result differs from that contemplated only in the respect that a different person or different property is affected, or that the injury or harm caused is less than contemplated; or

(b) the result involves the same kind of harm or injury as contemplated but the precise harm or injury was different or occurred in a different way, unless the actual result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense.

(3) If negligently causing a particular result is an element of an offense, and the result is not within the risk of which the offender is aware, or should be aware, either element can nevertheless be established if:

(a) the actual result differs from the probable result only in the respect that a different person or different property is affected, or that the actual injury or harm is less; or

(b) the actual result involves the same kind of injury or harm as the probable result, unless the actual result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense.

SUMMARY OF THE ARGUMENT

The respondent, as an initial matter, requests this Court to reconsider its grant of a Writ of Certiorari, or in the alternative to affirm petitioner's conviction of deliberate homicide because error, of any, was harmless beyond a reasonable doubt. The State was not required to prove that petitioner specifically intended the death of his victim. It was sufficient that he committed the homicide knowingly, i.e., that he was aware of the high probability that death would result from his attack. Sections 94-2-101(27), 94-5-102 and 94-5-105(2), R. C. M. 1947, and see *State v. McKenzie*, 581 P. 2d 1205, 1232 (Mont. 1978). Petitioner's confession, which was reaffirmed as accurate in defense counsel's statement and his own experts' testimony unequivocally stated that petitioner caused the death with the intent to inflict severe injury knowing his actions would probably result in her death. Therefore, even if the instruction was error, the error was harmless. The Writ should be dismissed as improvidently granted.

The challenged presumption originated in the common law, and is no more and no less than common sense and experience. It simply allows the jury to look at facts and circumstances of the crime as well as the accused's version in determining his state of mind. The presumption did not shift to petitioner the burden of persuasion with respect to any element of the offense charged or relieve the prosecution of its burden of proving all elements beyond a reasonable doubt. At most, it placed a burden of production on the petitioner. *State v. Sandstrom*, — Mont. —, 580 P. 2d 106 (1978). The presumption has the same form and effect as the inference in *Barnes v. United States*, 412 U. S.

837 (1973), and does not allow the jury to presume one element of the offense from proof of the other elements.

ARGUMENT

I.

The petition should be dismissed because the defendant admitted all of the elements of the crime charged: error, if any, in giving an instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" was harmless beyond a reasonable doubt.

Although the Court has already granted a Writ of Certiorari in the present case, the respondent urges the Court to reconsider its grant of the Writ, or in the alternative to affirm petitioner's conviction. Petitioner's confession, which he expressly reaffirmed during trial, and the testimony of a psychiatrist and a psychologist on petitioner's behalf admit without contradiction the existence of the essential elements of the crime of deliberate homicide.

The crime of "deliberate homicide" is defined in section 94-5-102, R. C. M. 1947, which was enacted in 1973 as a part of the "Montana Criminal Code."[1] The Criminal

1 Subsequent to the decision of the Montana Supreme Court in the case below, *State v. Sandstrom*, 580 P. 2d 106 (1978), the Montana legislature recodified the statutes of Montana, supplanting the 1947 Revised Codes of Montana (hereinafter designated as R. C. M. 1947) with the Montana Code Annotated (Mont. Code Annot.). The recodification was ef-

(Continued on next page)

Code abolishes definitions of mental states historically associated with criminal culpability, substituting more understandable and straightforward concepts. One of the stated purposes of the Code was to do away with the ill defined and nebulous terms traditionally describing criminal mental states:

> A major problem of prior Montana criminal law was the use on the code of numerous terms affecting culpability that were largely undefined. Under the new Code, the mental states required for various degrees of culpability are defined carefully in a heirarchy. • • •

Annotator's Notes, Montana Criminal Code 1973, Annot. at 73. With respect to homicide, the common law mental states of premeditation, deliberation and malice aforethought have been abandoned. Annotator's Notes, Montana Criminal Code 1973, Annot. at 115. Under the new Criminal Code, "A person commits the offense of criminal homicide if he purposely, knowingly or negligently causes the death of another human being."[2] Section 94-5-101 (1),

(Continued from previous page)

fective January 1979. (Montana Legislature, House Bill 1.) The following is a cross-reference of pertinent sections herein: For the purposes of this case respondent will continue to use Revised Codes of Montana section numbers.

Revised Codes of Montana	Montana Codes Annotated
94-2-101 (27)	45-2-101 (27)
94-2-101 (52)	45-2-101 (52)
94-2-105 (2)	45-2-105 (2)
94-5-101 (1)	45-5-101
94-5-102	45-5-102
94-5-103	45-5-103

2 Section 94-5-101 (1), R. C. M. 1947:
Criminal homicide. A person commits the offense of criminal homicide if he purposely, knowingly or negligently causes the death of another human being.

R. C. M. 1947. Criminal homicide constitutes deliberate homicide if, "it is committed *purposely or knowingly*, . . ."[3] Section 94-5-102, R. C. M. 1947. The requisite mental state for deliberate homicide under Montana law is phrased in the alternative. The death may be caused purposely *or knowingly*. "Purposely" is defined by section 94-2-101 (52), R. C. M. 1947:

> A person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result.

"Knowingly" is defined by section 94-2-101(27), R. C. M. 1947:

> A person acts knowingly with respect to conduct or to a cirmcumstance described by statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct.

---

3 Section 94-5-102, R. C. M. 1947:

Deliberate homicide. (1) Except as provided in 94-5-103 (1) (a), criminal homicide constitutes deliberate homicide if:

(a) it is committed purposely or knowingly; or

(b) it is committed while the offender is engaged in or is an accomplice in the commission of, an attempt to commit, or flight after committing or attempting to commit robbery, sexual intercourse without consent, arson, burglary, kidnapping, felonious escape, or any other felony which involves the use or threat of physical force or violence against any individual.

If the homicide is committed "purposely and knowingly" but "under the influence of extreme mental or emotional distress for which there is reasonable explanation or excuse," the crime is reduced to mitigated deliberate homicide. Section 94-5-103, R. C. M. 1947.

A defendant need not intend the death of his victim; it is sufficient that he was aware that it was highly probably that his actions would result in the death of another human being. Thus, in *State v. McKenzie*, 581 P. 2d 1205, 1231-1232 (Mont. 1978), the Montana Supreme Court generally described the requisite mental state for deliberate homicide as follows:

> The prescribed mental state of "purposely or knowingly" applies to each element of the crime of deliberate homicide, Section 94-2-103 (1) and (2), R. C. M. 1947. To be guilty of deliberate homicide, therefore, one must *either* have the purpose to kill *or know that it was highly probable that his actions would result in the death of another human being.*
>
> * * *
>
> In Montana a person commits the offense of deliberate homicide if he purposely or knowingly causes the death of another human being. Sections 94-5-102 (1) (a), 94-5-101 (1), R. C. M. 1947. The statutorily defined elements of the offense, each of which the State must prove beyond a reasonable doubt, are therefore causing the death of another human being with the knowledge that you are causing or with the purpose to cause the death of that human being. *A person acts "with knowledge" or "knowingly" " * * * with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct.* * * "* Section 94-2-101 (27), R. C. M. 1947. (Emphasis added.)[4]

Petitioner in his quotation of *McKenzie* at p. 13 of his brief has omitted the italicized language.

---

4 But see note 6, infra.

Petitioner's argument in the present case derails in its exclusive focus on the mental state of "purposely" and its complete disregard of the alternative mental state of "knowingly." His arguments are predicated upon an assertion that petitioner did not have the "specific intent" to kill the deceased, Annie Jessen.

In his opening statement to the jury (App. 6) petitioner's attorney told the jury that petitioner admitted the facts stated in his prior confession. (App. 10). In that confession, petitioner admits he purposely and intentionally struck and stabbed the deceased:

> I got worried that someone would hear her so I picked up the shovel and hit her with it. I hit her in the back of the head. I thought it would stop her screaming, but it never. I couldn't understand what she was screaming about.
>
> She started to wheel her wheelchair and I got scared and didn't know what to do. There was a knife laying up on the counter, so I grabbed that and stabbed her. I stabbed her in the back five times. The knife went through the back of the wheelchair. She quit moving around and there was blood all over the place.

The thrust of his defense was that he only intended to silence her, not to kill her.[5]

---

5 In opening argument, defense counsel informed the jury that defendant would demonstrate that he took the life of Mrs. Jessen "impulsively", without planning or deliberation. (App. 6-8.) He closed by requesting:

* * *

> I will ask of you at that time to look at the consequences and return a verdict of not guilty of deliberate homicide requested by the prosecutor *but a verdict of mitigated homicide based on the position that the de-*

(Continued on the next page)

Petitioner's evidence as to his state of mind consisted of the testimony of a psychiatrist and a psychologist. That testimony, along with petitioner's confession, may be fairly characterized as raising an issue as to whether he specifically intended Annie Jessen's death. However, that same confession and expert testimony established without contradiction that while beating and stabbing Annie Jessen he was aware of the high probability that his victim would die as the consequence of his attack.

Dr. William Stratford, a psychiatrist, testifying on defendant's behalf, was asked if he had an opinion concerning whether petitioner "deliberated" as to the death of the deceased. The doctor responded:

> I understand the question, I am not sure of the context when you are using the word deliberation. If you use it in the sense that it was planned, I don't think that it was planned to cause her death. *If you are using the term deliberation to indicate that he perhaps*

(Continued from previous page)

> *fendant did not act with knowledge or purpose in taking Mrs. Jessen's life.* Thank you. (App. 8.) (Emphasis added.)

The closing request was reflected in jury instruction No. 13 (App. 37) wherein the court instructed:

> If you are convinced beyond a reasonable doubt that the defendant, David Sandstrom, caused the death of Annie Jessen on November 1, 1976, in Deer Lodge County, Montana, but you are not convinced beyond a reasonable doubt that the defendant caused the death of Annie Jessen purposely or knowingly, then you should find the defendant guilty of mitigated deliberate homicide.

The instruction was erroneous. "Purposely or knowingly" is an element of *both* deliberate and mitigated deliberate homicide. Sections 94-5-102 and 94-5-103, R. C. M. 1947, and see *Patterson v. New York*, 432 U. S. 197, 206-207 (1977). However, in convicting petitioner of deliberate homicide, the jury implicitly rejected petitioner's assertion that he did not act "purposely or knowingly."

> *purposely inflicted damage upon her in the deliberate sense, using the word in that context, I think that is true, he did deliberately do that. He did deliberately harm her.* (Emphasis added.)

(App. 16.) The doctor was then asked, "Do you believe that he formed the intent to take her life?" The answer was, "In my opinion his intention was to silence Mrs. Jessen." Following that same line of questioning, petitioner's attorney asked, "And you believe his intention was to stop her from screaming?" His answer was, "Yes." (App. 17.) The doctor later reiterated his opinion:

> And I think in my opinion that when he was confronted with her presence and confronted with the screaming that his intention was at that point to silence Mrs. Jessen *and when he was unable to do so with the shovel, pursued the course of events.* (Emphasis added.)

(App. 17.) On cross-examination the doctor further delimited his opinion of petitioner's mental state:

> In my opinion he purposely hit her with the shovel first and he purposely picked up the knife and *he* purposely inflicted the stab wounds on Mrs. Jessen.

(App. 20.) Defendant's other expert witness, Dr. Nash, a psychologist, testified:

> In my opinion he did not anticipate or plan the death of Mrs. Jessen. He was in the reacting—at the time of the offense I believe his mental condition could best be described as a condition of—a range of frustration and anger and that he was trying to prevent her from screaming and that if that had occurred at some earlier stage he may not have gone any further, *but that he took increasingly more severe steps to try to stop her from screaming and then that ultimately brought her to her death.* (Emphasis added.)

(App. 27.)

Finally, both Dr. Stratford and Dr. Nash testified concerning the petitioner's awareness of the consequences of his acts. Dr. Stratford testified:

> In my opinion he did—he did not intend to kill her, *but that he was aware of the fact that the instruments that he utilized were capable of causing her death.* (Emphasis added.)

(App. 21.)

Dr. Nash, in a response to the prosecutor's questions, testified:

> Q. And did he have the capacity to know when he picked up the shovel that hitting Mrs. Jessen would harm her?
>
> A. Yes.
>
> Q. When he began stabbing Mrs. Jessen, did he have the capacity to know that stabbing her could result in her death?
>
> A. I believe he had the basic capacity to do so.
>
> Q. To know that this would be the result?
>
> A. Yes.

(App. 31-32.) In summary, in attempting to show that he did not specifically intend Annie Jessen's death, petitioner affirmatively established that he was aware of the high probability that his actions would cause the death of Annie Jessen. Petitioner's version of the crime amounts to a confession—that he "knowingly" caused the death of Annie Jessen.[6] By the time the jury was instructed, the

---

6 Deliberate homicide could have been established even if the petitioner was unaware of the high probability that his

(Continued on the next page)

petitioner has already admitted the existence of all of the elements required to prove that petitioner "knowingly" caused the death of Annie Jessen. Thus, even if the instruction that, "The law presumes that a person intends the ordinary consequences of his voluntary acts," was error, the error was harmless.

Respondent acknowledges that it carries a heavy burden in showing that error, if any, was harmless. See *Chapman v. California,* 386 U. S. 18, 24, rehearing denied, 386 U. S. 987 (1967). Nonetheless, not every "departure from constitutional procedures should result in an automatic reversal . . ." *Harrington v. California,* 395 U. S. 250, 254 (1969); and *Chapman,* 22. Evidence of guilt in a particular case may be so "overwhelming" and "cumulative", *Harrington v. California,* 254; *Schneble v. Florida,* 405 U. S. 427, 430 (1972); or so "cumulative", "overwhelmingly" and "largely uncontroverted", *Brown v. United States,* 411 U. S. 223, 231 (1973), that it compels a conclusion that there was no reasonable possibility that the error affected the outcome of the trial, see *Chapman,*

(Continued from previous page)

action would cause Mrs. Jessen's death or was aware of the high probability that his acts would inflict serious bodily injury on Mrs. Jessen. Section 95-2-105 (2), R. C. M. 1947, provides:

> If purposely or knowingly causing a result is an element of an offense, and the result is not within the contemplation or purpose of the offender, either element can nevertheless be established if:
>
> (a) * * *
>
> (b) the result involves the same kind of harm or injury as contemplated but the precise harm or injury was different or occurred in a different way, . . .

The section was not considered in *McKenzie,* quoted supra at p. 3.

24. This is one of those cases: For while petitioner focused his trial efforts upon persuading the jury that he did not specifically "intend" Annie Jessen's death, he was presenting uncontroverted evidence that he "knowingly" caused her death.

Therefore, the facts of this case do not present a justiciable federal question and the writ should be dismissed as improvidently granted. *McCarthy v. Bruner,* 323 U. S. 673 (1944), *Needelman v. United States,* 362 U. S. 600 (1960).

II.

The instruction that the law presumes that a person intends the ordinary consequences of his voluntary acts did not relieve the state of its burden of proving all elements of deliberate homicide beyond a reasonable doubt.

The presumption that a person intends the ordinary consequences of his voluntary acts is not new. Rather, it is a rule of common experience handed down through the common law from antiquity. Greenleaf asserts that the presumption is found in the Mosaic code in the form that intent to murder is inferred from the deliberate use of a deadly weapon. 1 *Greenleaf On Evidence,* 16th Ed., § 13, p. 113 (1899). The rule is nothing more than a restatement of human experience and common sense. Thayer describes this application of common sense to law:

> Many facts and groups of facts often recur, and when a body of men with a continuous tradition has carried on for some length of time this process of reasoning upon facts that often repeat themselves, they cut

> short the process and law down a rule. To such facts they affix, by a general declaration, the character and operation which common experience has assigned to them.

Thayer, *A Preliminary Treatise on Evidence,* p. 326 (1898).

The reasons for applying this maxim to the criminal law is obvious:

> I do not think the rule in question is really a rule of law, further or otherwise than as it is a rule of common sense. The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequence of his conduct.

Vol. 2, Stephen, *History of Criminal Law of England,* p. 111 (1883).

In other words, the rule is one of a logical probability from the usual course of events. Clark and Marshall, *Crimes,* p. 243, § 5.03 (6th Ed. 1958). Thayer thought such presumptions not to be even part of the law of evidence:

> In whatever form they are made or ought to be made, their character is the same, that of general maxims and legal reasoning, having no peculiar relation to the law of evidence.

Thayer, supra, p. 335.

This presumption is related to a recurring problem of the criminal justice system, specifically the frequent confusion of motive and intent. Stephen believed the existence of the presumption is explained by the distinction between intention and motive:

> It is very common to say that a man's intentions were good when it is meant that his motives were good, and argue that his intention was not what it really was, because the motive which lead him to act as he did was the prevailing feeling in his mind at the time when he acted rather than the desire to produce the particular result which his conduct was intended to produce. This confusion of ideas not unfrequently leads to failures of justice.

Stephen, supra, 110. Evidentiary scholars hold that the presumption prevents an accused from using his ultimate motive to relieve himself of the immediate intent of his acts.

> Notwithstanding the compelling force of the reason underlying this presumption, it has often been subjected to criticism which has challenged its necessity. But it has withstood the attacks, safe on its foundation of authority and public policy. It will readily be seen that were no such presumption raised, crime would still more often go unwhipped of justice, and the criminal could carry his "I don't mean it" as a safe and certain talisman to keep him immune from the consequences of his misdemeanor.

1 *Jones On Evidence*, § 130, p. 211 (2nd Ed., 1926).

In other words, the presumption is utilized to tell the jury it does not have to accept the defendant's version as to his state of mind but that it may also look to defendant's acts and the facts and circumstances of the crime to deduce or infer his state of mind.

This Court in following the 19th century scholars has invoked the application of the presumption on several occasions. *Radio Officers v. Labor Board*, 347 U. S. 17, 45 (1953), *Cramer v. United States*, 325 U. S. 1, 31 (1944), *Agnew v. United States*, 165 U. S. 36, 50 (1897); *Reynolds v. United States*, 98 U. S. 244 (1878).

A. The presumption as used in the case below placed a burden of production on the petitioner.

Petitioner asserts that the presumption relieves the state of its burden of proving the requisite mental state of deliberate homicide beyond a reasonable doubt, citing *In re Winship*, 397 U. S. 358 (1970), *Mullaney v. Wilbur*, 421 U. S. 684 (1975), and *Patterson v. New York*, 432 U. S. 197 (1977). Crucial to petitioner's contention is his characterization of the effect of the jury instruction. Contrary to his position, the Montana Supreme Court found, and respondent submits, that the use of the presumption in this case does not relieve the state of proving all the elements of the crime charged beyond a reasonable doubt. Rule 301 (b) (2) of The Montana Rules of Evidence provide that a disputable presumption must be overcome by a preponderance of evidence. Petitioner argues this was the burden placed on him by the instruction. However, the jury was given no instructions describing or defining the effect of presumption. The presumption was given in a simple one sentence statement without further explanation. Statutory provisions and rules of court defining the applications and limitations of presumptions and inferences have no application to the inquiry. The question is presented, what is the effect of the presumption when the jury is not given direction with regard to its use?

Initially, the effect of presumptions is not without doubt or controversy. "[L]egal presumptions involve subtle conceptions to which not even judges always bring clear understanding." *Bollenbach v. United States*, 326 U. S. 607, 614 (1946). The term "presumption" has been

subject to divergent definitions and applications,[7] as can be particularly illustrated in the case of the presumption that the law presumes that a person intends the ordinary consequences of his voluntary acts. That presumption has been used in connection with determining whether a prima facia case has been established.[8] It has also been used to supply by implication an allegation.

More specifically, in the context of the present case, courts have differed as to the effect of the presumption when given as a jury instruction without further explanations as to its use by the jury. State courts have reached conclusions as diverse as the locations of the courts.

The Alabama Supreme Court concludes that the instruction is misleading in that the jury could believe that the occurrence of the particular facts giving rise to the presumption shifts the burden of proof of knowledge or intent. *Hall v. State*, 49 Ala. 381, 272 S. 2d 590 (1973). The Washington court holds that when the operation of the presumption is not qualified it has the effect of requiring the defendant, by some unexplained standard of proof, to refute the presumption. (This unexplained standard is characterized as more than a shifting of the burden of production.) *State v. Roberts*, 88 Wash. 2d 337, 562 P. 1259 (1977). The Kansas court holds the unqualified presumption has a conclusive effect and required that the jury be

---

7 See generally Thayer, supra, ch. 8-9; Wigmore, Evidence (3rd Ed., 1940) §§ 2490-2540; Morgan, Some Observations Concerning Presumptions (1931), 44 Harv. L. Rev. 906; Denning, Presumptions and Burdens, (1945) 61 L. Q. Rev. 379.

8 E. g., *State v. Walker*, 35 N. C. App. 182, 241 S. E. 2d 89, 921 (1978); *State v. Holley*, 174 Conn. 22, 381 A. 2d 539, 541 (1977).

instructed that the presumption can be overcome by contrary evidence. *State v. Warbritton*, 211 Kan. 506, 506 P. 2d 1152 (1973).

On the other hand, the Arizona court finds the unqualified presumption to be nothing more than a prima facia inference which shifts the burden of production to the defendant. *State v. Preis*, 89 Ariz. 336, 362 P. 2d 660 (1961). Arizona's position is supported by courts of other states, including the courts of Washington and Kansas, which hold that if other instructions clearly indicate the burden of proof is on the prosecution to prove every element beyond a reasonable doubt, the unqualified instruction does not shift any burden of proof to the defendant. *State v. Vandiver*, 584 P. 2d 978 (Wash. 1978); *State v. Warbritten*, supra; *Bishop v. People*, 165 Colo. 423, 439 P. 2d 342 (1968); *Cullin v. State*, 565 P. 2d 445 (Wyo., 1977); and cf. *Patterson v. State*, 239 Ga. 409, 238 S. E. 2d 2 (1977); *Turner v. United States*, 396 U. S. 489, 406 (1970).

The Montana Supreme Court has adopted the latter position in its decision below, finding the unqualified instruction to shift *only* the burden of production. It said:

> Defendant's sole burden under instruction No. 5 was to produce some evidence that he did not intend the ordinary consequences of his voluntary acts, not to disprove that he acted "purposely" or "knowingly".

By so ruling, the Montana court adopted the interpretation of the presumption espoused by Stephen, Jones and Thayer.

B. The presumption in this case comports with the due process standards under Barnes v. United States.

Petitioner's reliance on *Winship*, *Mullaney* and *Patterson* is misplaced. *Mullaney* precludes the use of a presumption which establishes one element of an offense after the jury finds the other elements to exist. In other words, it precludes the use of an elemental presumption which shifts the burden of persuasion to the defendant to disprove the element so established.

The presumption in this case differs. It is an evidentiary presumption and does not arise automatically on the finding of the other elements of the offense. Rather, the presumption comes into use only after, the jury is satisfied as to the existence of the additional certain preliminary fact that the result (death) is an "ordinary consequence" of the act.

Further, the presumption did not place a burden of persuasion of the petition, but merely shifts the burden of production. The burden of proving all the elements remains on the prosecution. The presumption is of the same effect as the inference approved in *Barnes v. United States*, 412 U. S. 837 (1973). Compare *Turner v. United States*, supra, 396 U. S. 489 (1970); *United States v. Gainey*, 380 U. S. 63 (1965).

The jury instruction considered in *Barnes* was to the effect that from unexplained possession of recently stolen property the jury could infer knowledge that the property was stolen. *Barnes*, 839. The instruction was a traditional common law inference transported from England and infused into the American criminal system. *Barnes*, 843-844. It has consistent and longstanding judicial approval. *Barnes*, 844. In passing upon the constitutionality of the inference the Court used the test long ago established by the common law theoreticians:

> The evidence established that petitioner possessed recently stolen treasury checks payable to persons he did not know, and it provided no plausible explanation for such possession consistent with innocence. On the basis of this experience alone *common sense and experience* tells us that petitioner must have known or been aware of the high probability that the checks were stolen. (Citations omitted.) (Emphasis added.)

Applying this common sense and experience test and relying on the long established use of the common law inference, the inference was found to comport with due process because the jury could find beyond a reasonable doubt upon the evidence that the accused knew the property was stolen. *Barnes,* 845.

The presumption is here strikingly similar in both form and effect to the inference in *Barnes.* Both allow an inference as to state of mind to be drawn from the facts and circumstances. Both are derived from the common law and have long standing judicial approval. Both are an embodiment of common sense and experience. Both expressly recognize normal and ordinary probabilities of human conduct, and permit a jury to employ that recognition in reaching a verdict. Both are procedural devices permitting the trier of fact to conclude that the prosecution has met its burden of proof with respect to the presumed or inferred fact by having satisfactorily established other facts. *Mullaney,* 703, N. 31.

Barnes was the culmination of a line of cases dealing with presumptions under the due process clause. The recent cases of *In re Winship* and its progeny; *Mullaney v. Wilbur* and *Patterson v. New York* do not undermine

the holdings of *Barnes* and its ancestors. *Mullaney* explicitly recognized the continuing vitality of *Barnes. Mullaney,* 703, N. 31.

C. The instructions as a whole required the state to prove all elements beyond a reasonable doubt.

Jury instructions must be reviewed as a cohesive whole rather than in dismembered isolation under the cold microscopic lens. *Cupp v. Naughten,* 414 U. S. 141, 146 (1973).

The jury in the present case was instructed that: before they could convict they had to be convinced beyond a reasonable doubt that the defendant caused the death of the deceased purposely or knowingly (Inst. 3, App. 34); the accused is presumed innocent until proven guilty beyond a reasonable doubt and this presumption continues until overcome by competent evidence which displaces any reasonable doubt of guilt (Inst. 4, App. 35); and the burden of proof rests upon the state to establish guilt beyond a reasonable doubt and a conviction is unwarranted unless the burden is sustained (Inst. 2).

Read together, the jury was clearly and unequivocally instructed that the prosecution had to establish the elements of the crime beyond a reasonable doubt.[9] *Mullaney* and *Patterson* require no more.

---

9 The Federal Circuit Court cases cited by petitioner (App. 20-21) reinforce this argument. Most upheld the convictions even though the opinions disapproved of the particular instruction challenged. In fact, *United States v. Garrett,* 574 F. 2d 778 (3d Cir. 1978), cert. denied — U. S. — (1978),

(Continued on the next page)

CONCLUSION

The petitioner by his own evidence established the mental state necessary for his conviction of deliberate homicide. Any alleged error in giving the instruction is thereby rendered harmless. The instruction was found by the Montana Supreme Court to have the same form and effect as the inference in *Barnes* and under that ruling has the same effect subscribed to it by the common law scholars. The ruling in *Mullaney* is not applicable. The instruction was properly given and respondent, State of Montana, respectfully requests the writ be dismissed.

Respectfully submitted this 24th day of March 1979.

MICHAEL T. GREELY
Attorney General
State of Montana
Helena, Montana 59601

MIKE McCARTER
Assistant Attorney General

DENNY MOREEN
Assistant Attorney General

JOHN RADONICH
Deer Lodge County Attorney
Anaconda, Montana 59711

Attorneys for Respondent

(Continued from previous page)

affirmed the defendant's conviction because the court said other instructions given to the jury regarding the government's burden of proof cured any defect in the specific instruction challenged. See *United States v. Netterville*, 553 F. 2d 903 (1977), cert. denied 434 U. S. 1009 (1978).